No. 2391

United States

Circuit Court of Appeals

For the Ninth Circuit.

STEWART MINING COMPANY, a Corporation,
Appellant,

vs.

SIERRA NEVADA MINING COMPANY, a Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

Filmer Bros. Co., Print. 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

[Names and Addresses of Attorneys.]

CULLEN, LEE & MATTHEWS, Spokane, Washington,

GUNN, RASCH & HALL, Helena, Montana,
Solicitors for Appellant.

CURTIS H. LINDLEY, San Francisco, Cal.,

MYRON A. FOLSOM, Spokane, Washington,
Solicitors for Respondent.

In the District Court of the United States, District of Idaho, Northern Division, Holding Term at Coeur d'Alene.

STEWART MINING COMPANY, a Corporation,
Complainant,

vs.

SIERRA NEVADA MINING COMPANY, a Corporation,
Defendant.

Bill of Complaint.

To the Honorable, the Judge of the District Court of the United States, District of Idaho, Northern Division.

The Stewart Mining Company, a corporation, created and existing under and by virtue of the laws of the State of Washington, brings this, its bill of complaint, against the defendant, The Sierra Nevada Mining Company, a resident and citizen of the State of Oregon, and thereupon your orator complains and alleges:

I.

That your orator is now and at all times since the year 1902 has been a corporation duly organized and existing under and by virtue of the laws of the State of Idaho, and a resident and citizen of such State, and empowered to own, possess and enjoy the mining claim and property hereinafter described.

II.

That the defendant, the Sierra Nevada Mining Company, is a corporation organized and existing under and by virtue of the laws of the State of Oregon and a resident and citizen of [1*] such State.

III.

That your orator is now, and for a long time hitherto has been, the owner in fee, in possession of, and entitled to the possession of, that certain quartz lode mining claim situated in Yreka Mining District, Shoshone County, Idaho, known and designated as the Senator Stewart Fraction lode mining claim, and of all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of the surface lines of said mining claim extended down and vertically, although such veins, lodes or ledges may so far depart from a perpendiculiar in their course downward as to extend outside of the vertical side lines of the said claim, which said mining claim is particularly described in the United States patent issued therefor as follows:

Beginning at corner No. 1, from which corner common to Sections one (1), two (2), eleven

*Page-number appearing at foot of page of original certified Record.

(11), and twelve (12), of Township forty-eight (48) North, Range two (2) east, B. M. bears north eighty-six (86) degrees, eleven (11) *inches* thirty (30) seconds west, three hundred twenty and thirty-eight hundredths (320.38) feet; thence south twenty-four (24) degrees, thirty-eight (38) minutes west, six hundred (600) feet to corner No. 2; thence north sixty-three (63) degrees, fifty-five (55) minutes west, thirteen hundred eighty-five and four-tenths (1385.4) feet to corner No. 3; thence north twenty-four (24) degrees, thirty-eight (38) minutes east, five hundred (500) feet to corner No. 4; thence south sixty-eight (68) degrees three (3) minutes east, thirteen hundred eighty-six and forty-seven hundredths (1386.47) feet to place of beginning, containing an area of sixteen and one hundred and ninety-six thousandths (16.196) acres, more or less.

That within said Senator Stewart Fraction quartz lode mining claim is a certain vein or lode bearing silver, lead and other valuable minerals, the top or apex of which vein or lode crosses the easterly end line of said claim at approximately the center thereof between corners Nos. 1 and 2 and extends within the boundaries of said claim in a westerly direction, following the general course of said claim, for a distance of seven hundred five (705) feet, more or less. [2]

That said vein or lode has a downward course and descends into the earth southerly and beyond the

south boundary and side line of said claim into and beneath the surface of the Sierra Nevada mining claim, Survey No. 554, and Carbonate mining claim, Survey No. 764, owned by the defendant mining company, being patented mining claims.

IV.

Your orator further avers that for many years last past your orator has been and is now the owner in fee, in the possession of, and entitled to the possession of said vein or lode, the top or apex of which is within said Senator Stewart Fraction quartz lode mining claim, as aforesaid, between a vertical plane drawn downward through the east end line of said claim extended southerly in its own direction indefinitely, and a vertical plane drawn downward through a line seven hundred five (705) feet westerly from said east end line and parallel thereto extended as aforesaid.

V.

Your orator further avers that said defendant is the owner, or claims to be the owner, of the Sierra Nevada, Survey No. 554, and Carbonate, Survey No. 764, mining claims situated in the Yreka Mining District, Shoshone County, Idaho, and lying in a group about six hundred (600) feet southerly from said Senator Stewart Fraction quartz lode mining claim, and claims an estate or interest adverse to complainant in and to that part of said vein or lode having its apex within the boundaries of the Senator Fraction quartz lode mining claim as aforesaid beneath the said Sierra Nevada and Carbonate mining claims,

which part is between the planes extended as aforesaid.

VI.

Your orator further avers that the said defendant, [3] Sierra Nevada Mining Company, has driven a long tunnel from the surface from one of its said planes into and towards the said vein, which apexes within the said Senator Stewart Fraction quartz lode mining claim, for the purpose of intersecting the said vein, and threatens to and is about to enter in and upon the said vein for the purpose of extracting ore therefrom.

VII.

Your orator further avers that the claim of the said defendant is false and groundless, and without any right whatsoever, and constitutes a cloud upon your orator's title thereto, and that the said defendant has no right, title, estate or interest whatever in or to said vein or lode, or any part thereof.

VIII.

Your orator further avers that that portion of said vein or lode to which said defendant wrongfully asserts title and claim, as herein alleged, exceeds in value the sum of one hundred thousand ($100,000.00) dollars, exclusive of interests and costs.

IX.

That your orator has no plain, speedy or adequate remedy in the ordinary course of law.

IN CONSIDERATION WHEREOF, and forasmuch as your orator is entirely remediless in the premises *at* according to the strict rules of the common law, and can secure relief only in a court of

equity where matters of this nature are properly cognizable and relievable, and to the end that the said defendant may appear and answer to all and singular the matters in this bill of complaint, but not under oath, an answer under oath being hereby expressly waived, your orator [4] prays that said defendant may be made to set forth the nature of his claim, and that all adverse claims of said defendant may be determined by the decree of this Court, and that by said decree it be declared and adjudged that said defendant has not any estate or interest whatsoever in or to said vein or lode or any portion thereof, between the planes above described, and that by said decree it be declared and adjudged that the title of your orator thereto is good and valid, and that said defendant be enjoined and forever restrained from asserting any claim whatsoever in or to said vein or lode between said planes.

May it please your Honor to grant unto your orator a writ of subpoena of the United States of America, directed to said defendant, commanding it to appear on a day certain and answer unto this bill of complaint, and to abide by and perform the order and decree of this Court.

STEWART MINING COMPANY,
By CULLEN, LEE & HINDMAN,
GUNN, RASCH & HALL,
Solicitors for Complainant. [5]

State of Washington,
County of Spokane,—ss.

Arthur B. Lee, being first duly sworn, deposes and

says, that he is one of the solicitors for the above-named plaintiff, corporation; that the reason why this verification is made by him that no other officer of said company is now within Spokane County, Washington, wherein its said solicitor resides; that he has read the above and foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated upon information and belief, and as to those matters that he believes them to be true.

ARTHUR B. LEE.

Subscribed and sworn to before me this 2d day of January, 1913.

[Seal] B. A. HOFFINE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

[Endorsed]: Filed Jan. 6, 1913. A. L. Richardson, Clerk. [6]

In the District Court of the United States for the District of Idaho, Northern Division.

STEWART MINING COMPANY, a Corporation,
Complainant,

vs.

SIERRA NEVADA MINING COMPANY, a Corporation,
Defendant.

Answer.

The defendant, Sierra Nevada Consolidated Mining Company, a corporation, incorrectly referred to

and called in the complaint the Sierra Nevada Mining Company, answers the Bill of Complaint as follows:

I.

Defendant admits that plaintiff is the owner in possession of the Senator Stewart Fraction quartz lode mining claim. Defendant denies that the said claim is described in the United States patent as set forth in the complaint. The description set forth in said complaint correctly describes the exterior lines bounding said claim, as the same are described in the patent, but the said patent in addition to the description contained in paragraph three (3) of the complaint, contains an exception of certain grounds in conflict with the Quaker Patented lode mining claim.

Defendant denies that plaintiff is the owner of all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of the surface lines of said Senator Stewart Fraction lode mining claim. Defendant admits that within said Senator Stewart Fraction lode mining claim there is a [7] certain vein or lode bearing silver, lead and other valuable minerals; but defendant denies that the top or apex of said vein or lode crosses the easterly end line of said claim at approximately the center thereof between corners number one and two; or that the said top or apex crosses the said end line at any other place; and defendant denies that the said top or apex extends within the boundaries of said claim in a westerly direction following the general course of said claim for a distance of seven hundred and five feet; or for any distance. Defendant alleges that the course of said apex of said vein is substantially par-

allel with the end lines of said claim, and lies within a distance of about four hundred and fifty feet of the westerly end line; and if not cut off by faults on the northerly and southerly ends, would cross the side lines of said claim.

Defendant admits that the said vein or lode has a downward course, and descends into the earth in an easterly direction and passes underneath the easterly end line of said claim; but defendant denies that the said vein has a downward course or descends into the earth southerly; or that it passes beyond the south boundary or side line of said claim into or beneath the surface of the Sierra Nevada or Carbonate lode claims.

II.

Defendant denies that complainant has been for many years or now is the owner in fee, in possession of and entitled to the possession of any portion of said vein having its top or apex in the Senator Stewart Fraction lode mining claim lying between a vertical plane drawn downward through the east end line of the Senator Stewart Fraction lode mining claim extends southerly in its own direction indefinitely, and a vertical plane drawn downward through a line seven hundred and five feet westerly from said east end line and parallel thereto extended as aforesaid. Defendant denies that the plaintiff is the owner of any portion of said [8] vein lying southerly of the south side line of said claim.

III.

Defendant admits that it is the owner of the Sierra Nevada and Carbonate lode mining claims; and ad-

mits that it claims to be and is the owner of all ores and minerals beneath the surface of, or which may be a part of, said lode mining claims by virtue of its ownership of the said Sierra Nevada and Carbonate lode mining claims.

IV.

Defendant admits that it has driven a tunnel for the purpose of intersecting ore bodies and veins beneath the said Sierra Nevada and Carbonate lode mining claims, the property of said defendant, and if any ore or mineral of commercial value is encountered by said tunnel, the said defendant will extract and remove the same, as it has a right to do by virtue of its ownership of the said mining claims.

V.

Defendant denies that its claim of ownership to the said claims is false or groundless, or without any right; or that it constitutes a cloud upon complainant's title. Defendant alleges that it is the owner in possession and entitled to the possession of the said Sierra Nevada and Carbonate lode mining claims; and of all veins, lodes, ledges, and minerals beneath the surface of or which constitute a part of said lode mining claims.

VI.

Defendant admits that said ores and veins which constitute a part of said lode mining claim, and which lie beneath the surface thereof, is of the value of One Hundred Thousand ($100,000) Dollars, exclusive of interest and costs; but defendant denies that it wrongfully asserts title or claim to said ore bodies.

[9]

WHEREFORE, defendant prays that complainant take nothing by its bill; that the same be dismissed; and that defendant be awarded its costs.

CURTIS H. LINDLEY,
MYRON A. FOLSOM,
Solicitors and Counsel for Said Defendant.

SIERRA NEVADA CONSOLIDATED MINING COMPANY,
By MYRON A. FOLSOM,
Its Attorney.

Received copy this 27th day of February, 1913.

CULLEN, LEE & HINDMAN,
Solicitors for Complainant.

[Endorsed]: Filed March 1, 1913. A. L. Richardson, Clerk. [10]

In the District Court of the United States, District of Idaho, Northern Division.

STEWART MINING COMPANY,
Complainant,

vs.

BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY,
Defendant.

STEWART MINING COMPANY,
Complainant,

vs.

JONATHAN BOURNE, Junior,
Defendant.

STEWART MINING COMPANY,

Complainant,

vs.

SIERRA NEVADA CONSOLIDATED MINING COMPANY,

Defendant.

Motion [for Continuance of Cases].

Now comes the plaintiff in the above-entitled causes, consolidated, and moves the Court to cancel the setting of said cases for trial, and to continue the said causes over the present term of said court, and in support of this motion there is presented herewith the affidavit of M. W. Bacon.

FEATHERSTONE & FOX,
CULLEN, LEE & HINDMAN,
GUNN, RASCH & HALL,
Attys. for Pltf.

Received copy May 29, 1913.
MYRON A. FOLSOM. [11]

ENDORSED:

Nos. 557, 558 & 563.

In the District Court of the United States, District of Idaho, Northern Division.

STEWART MINING COMPANY,

Complainant,

vs.

BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY,

Defendant.

STEWART MINING COMPANY,

Complainant,

vs.

JONATHAN BOURNE, Junior,

Defendant.

STEWART MINING COMPANY,

Complainant,

vs.

SIERRA NEVADA CONSOLIDATED MINING COMPANY,

Defendant.

MOTION.

Filed June 2, 1913. A. L. Richardson, Clerk.

FEATHERSTONE & FOX,

Wallace, Idaho,

GUNN, RASCH & HALL,

Helena, Mont.,

CULLEN, LEE & HINDMAN,

Attys. for Plaintiff. [12]

In the District Court of the United States, District of Idaho, Northern Division.

STEWART MINING COMPANY,

Complainant,

vs.

BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY,

Defendant.

STEWART MINING COMPANY,

Complainant,

vs.

JONATHAN BOURNE, Junior,

Defendant.

STEWART MINING COMPANY,

Complainant,

vs.

SIERRA NEVADA CONSOLIDATED MINING COMPANY,

Defendant.

Affidavit of W. M. Bacon.

State of Washington,
County of Spokane,—ss.

M. W. Bacon, being first duly sworn, deposes and says: That he is and has been for over a year last past, the general manager of the Stewart Mining Company, the plaintiff in the above-entitled suits consolidated. That heretofore, and on or about the 12th day of May, 1913, a Stipulation was entered [13] into, for the consolidation of said causes, and providing for use at the trial of said causes, so consolidated, of certain testimony heretofore taken in a certain action commenced in the District Court of the First Judicial District of the State of Idaho, in and for Shoshone County, in which the Stewart Mining Company is plaintiff, and the Ontario Mining Company et al. are defendants, which Stipulation has been submitted to and approved by this Court, and is now on file in said causes consolidated. That the prin-

cipal issue in said causes is with reference to the apex of the vein in controversy. That it is alleged and contended by the plaintiff that said vein has its apex within the surface boundaries of the Senator Stewart Fraction quartz lode mining claim, and that such vein extends from such apex on a downward course to the ore bodies in controversy, which are situated between vertical planes drawn downward through the end lines of the Senator Stewart Fraction claim, extended indefinitely in their own direction. That at the trial of said action in the State court a large model purporting to show the termination of said vein within the Senator Stewart Fraction claim, and the location and situation of said vein with reference to said Senator Stewart Fraction claim, and with reference to the Ontario quartz lode mining claim, and other claims, was offered in evidence by the defendants in said action, and received in evidence, and now constitutes one of the exhibits referred to in such stipulation. That there was also offered in evidence by the plaintiff in said action another model, purporting to show the alleged apex of said vein in the Senator Stewart Fraction claim, and the downward course of said vein, and its situation and location with reference to said Senator Stewart Fraction claim. That there were also [14] offered and received in evidence a large number of other models and maps illustrative of the contentions made by the respective parties in such litigation.

Affiant further says that Judgment was rendered and entered in favor of the defendants in said action in said State court, and that thereupon an appeal

from said Judgment to the Supreme Court of the State of Idaho was taken by the plaintiff. That in perfecting said appeal a complete record of the testimony in said action, and all of the exhibits, consisting of such maps and models, were filed in the office of the Clerk of the Supreme Court of Idaho, and that on or about the 3d day of May, 1913, the Supreme Court of the State of Idaho decided said case, and affirmed the Judgment of the lower court therein. That this affiant is informed by his attorneys, and verily believes, that a Federal question is presented by the record of the Supreme Court in said cause, and that the Judgment of said Supreme Court is subject to review by the Supreme Court of the United States. That the papers necessary and required to have said Judgment reviewed by the Supreme Court of the United States have been prepared, and on Tuesday, the 27th day of May, 1913, Mr. Hindman, of the firm of Cullen, Lee & Hindman, attorneys for the plaintiff in said causes, left Spokane for Boise City, Idaho, for the purpose of presenting a petition to the Chief Justice of the Supreme Court of Idaho, for the allowance of a Writ of Error for the review of said Judgment by the Supreme Court of the United States. That in order to properly present said cause to the Supreme Court of the United States, it is necessary that all of the exhibits, consisting of such models and maps, and a complete record of the testimony in said cause, be certified to the Supreme Court of the United States, in obedience to the command of the Writ of Error, which [15] has been, or will be, issued.

Affiant further says that a large part of the testimony in said action in the State Court was with reference to and in explanation of the maps and models so introduced in evidence. That such testimony with reference to said exhibits is unintelligible and of no value or benefit in the trial of the above causes consolidated without the production of said models and maps. That the officers of the plaintiff, the Stewart Mining Company, did not determine to have the Judgment in said action reviewed by the Supreme Court of the United States until about the 15th day of May; that when said Stipulation was entered into for the consolidation of said causes, as aforesaid, it was contemplated that the maps and models could be withdrawn from the office of the Clerk of the Supreme Court of Idaho for use on the trial of said causes consolidated, but that the proceedings taken to have the Judgment in said cause reviewed by the Supreme Court of the United States prevents the withdrawal of said maps and models, and if said causes consolidated are tried before said action so commenced in the State Court of Idaho is finally decided by the Supreme Court of the United States, it will be necessary to have duplicates of said models and copies of said maps made. That it was intended when said Stipulation was entered into that the defendants in said causes consolidated, or their attorneys, would produce at the trial of said causes the maps and models, or copies of the maps and duplicates of the models introduced by them in evidence in the State court, and that the plaintiffs in said cause would produce the maps and models, or copies of the maps and duplicates of

the models, introduced in its behalf in evidence in said State court; that the plaintiff cannot safely proceed to trial of said causes consolidated without the production [16] of all of said maps and models, or of copies of all of said maps, and duplicates of said models; that plaintiff intends to call other witnesses, as provided in such Stipulation, and the testimony of such other witnesses will be directed largely to such maps and models. That it will be impossible within the limited time which will expire before the date fixed for the trial of said causes to obtain duplicates of the models and copies of the maps introduced in evidence by the plaintiff in said action in the State court.

Affiant further says that whether or not the plaintiff in said causes consolidated will prevail depends upon the question of whether or not the vein in controversy has its apex within the Senator Stewart Fraction claim, as alleged in the Complaint in said causes; that a decision by the Supreme Court of the United States in said cause so commenced in the State court will determine the question of apex aforesaid, as presented by the record in said cause; that it is the purpose of said plaintiff to file the record in said cause so commenced in the State court in the office of the clerk of the Supreme Court of the United States at the earliest possible date, and to have said cause advanced for hearing by the Supreme Court of the United States if possible to do so. That under the circumstances affiant verily believes that it will be a needless expense to the parties to said causes consolidated and a waste of time by the Court to try said

causes at this time, and before a decision of the Supreme Court of the United States.

Affiant further says that the plaintiff is now engaged in prosecuting extensive development work in the Senator Stewart Fraction claim, for the purpose of more clearly disclosing and exposing the alleged apex of said vein in said claim. That affiant believes that such development work [17] will strengthen and support the claim of said plaintiff with reference to said apex in said Senator Stewart Fraction claim, and evidence of such development work will be absolutely essential at the trial of said causes consolidated, if the Supreme Court of the United States should hold that upon the record made in the action in the State court the termination of said vein in said Senator Stewart Fraction claim is not the apex thereof; that the plaintiff will be wholly unable to complete such development work by the time fixed for the trial of said cause, or for several weeks thereafter.

Affiant further says that Mr. H. V. Winchel, an eminent geologist, was the principal witness for said plaintiff in said action in the State court, and that it is the intention of said plaintiff to have said Winchel testify with reference to matters material to the issues involved in said causes consolidated at the trial thereof; that the said Winchel has been retained by said plaintiff at a considerable expense, as a witness in said causes consolidated; that affiant is advised that the said Winchel is now, and has been for several months, absent from the United States, and is either in South America or en route from South America to England, and it will be absolutely impossible to ob-

tain the attendance of said Winchel as a witness on the date fixed for the trial of said causes. That affiant is informed that the said Winchel cannot return to the United States until some time in the month of July.

Affiant further says that he was not advised that the defendants in said causes consolidated would insist upon said causes being tried upon the date fixed for the trial thereof until within the last ten days; that he was informed by his attorneys that the trial of said causes would be continued, [18] and no additional testimony would be taken at this term of the above-entitled court, for which reason this affiant, as general manager of the said plaintiff, has not prepared for the trial of said causes as he otherwise would have done.

Affiant further says that for the reasons herein stated, the said plaintiff cannot safely proceed to trial on the date fixed for the trial of said causes.

M. W. BACON.

Subscribed and sworn to before me this 29th day of May, A. D. 1913.

[Seal] E. EUGENE DAVIS,
Notary Public, in and for the State of Washington,
Residing at Spokane, Washington.

Received copy May 29, 1913.

MYRON A. FOLSOM. [19]

ENDORSED:

Nos. 557, 558 & 563.

In the District Court of the United States, District of Idaho, Northern Division.

STEWART MINING COMPANY,
Complainant,

vs.

BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY,
Defendant.

STEWART MINING COMPANY,
Complainant,

vs.

JONATHAN BOURNE, Junior,
Defendant.

STEWART MINING COMPANY,
Complainant,

vs.

SIERRA NEVADA CONSOLIDATED MINING COMPANY,
Defendant.

AFFIDAVIT.

Filed June 2, 1913. A. L. Richardson, Clerk.

FEATHERSTONE & FOX,
Wallace, Idaho,
GUNN, RASCH & HALL,
Helena, Mont.,
CULLEN, LEE & HINDMAN,
Attys. for Plaintiff. [20]

In the District Court of the United States, District of Idaho, Northern Division.

STEWART MINING COMPANY,

Complainant,

vs.

BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY,

Defendant.

STEWART MINING COMPANY,

Complainant,

vs.

JONATHAN BOURNE, Junior, and LILLIAN E. BOURNE,

Defendants.

STEWART MINING COMPANY,

Complainant,

vs.

SIERRA NEVADA CONSOLIDATED MINING COMPANY,

Defendant.

STIPULATION CONSOLIDATING ABOVE CAUSES AND PROVIDING FOR USE OF TESTIMONY HERETOFORE TAKEN.

WHEREAS, the Stewart Mining Company, complainant in each of the above-entitled causes, is asserting title to certain portions of a mineral vein or lode lying outside of the exterior boundaries of the Stewart Fraction lode mining claim, and is basing its claim of title upon the allegation that the vein in

question has its apex within said Stewart Fraction lode mining claim, and,

WHEREAS, in each of the above-entitled causes the allegations of the complaint are identical so far as the foundation of [21] plaintiff's title is concerned, and,

WHEREAS, the defendant in the several causes above mentioned are very similar, and,

WHEREAS, in a cause which was commenced by the Stewart Mining Company against the Ontario Mining Company, Stanley A. Easton and Myron A. Folsom, in the District Court of the First Judicial District of the State of Idaho for Shoshone County, the issues are very similar to those involved in the above-entitled causes, and,

WHEREAS, in said cause a large amount of testimony was taken and a large number of exhibits were introduced, all of which testimony and exhibits would be as pertinent to the issues in the above-entitled causes as in the case in which the same were offered:

NOW, THEREFORE, for the purpose of saving the time of the courts, and of the parties herein, and for the purpose of saving expenses, it is hereby stipulated as follows:

I.

The three causes above entitled are hereby consolidated for the purpose of trial, appeal and other proceedings in said cause.

II.

It is further stipulated that a copy of the testimony taken and the exhibits or copies and duplicates there-

of offered in the case which was commenced in the State District Court for the First Judicial District, Shoshone County, above referred to, may be filed in either one of the above-entitled causes with the same force and effect as if the witnesses had been sworn, examined and cross-examined, and the exhibits offered and received in the above-entitled court and causes, and when so filed shall constitute a part of the record in each of said causes.

III.

It is further stipulated that either party to the above-entitled [22] causes may offer additional testimony upon any subject not covered by the testimony to be filed as aforesaid, but no more than three witnesses shall be called by either side.

Dated this 12th day of May, 1913.

M. S. GUNN,
FEATHERSTONE & FOX,
CULLEN, LEE & HINDMAN,
Attorneys for Stewart Mining Company, Plaintiff.

CURTIS H. LINDLEY,
MYRON A. FOLSOM,
Attorneys for Defendant, Bunker Hill Mining & Concentrating Company.

CURTIS H. LINDLEY,
MYRON A. FOLSOM,
Attorneys for Defendant, Sierra Nevada Consolidated Mining Company.

MYRON A. FOLSOM,
Attorney for Defendant, Jonathan Bourne, Junior.

The above stipulation is approved, and an order

may be entered in each of the above-entitled causes accordingly.

_____,

District Court Judge.

[Endorsed]: Filed May 26, 1913. A. L. Richardson, Clerk. [23]

At a stated term of the United States District Court for the District of Idaho, Northern Division, held at Coeur d'Alene, Idaho, on Monday, the 26th day of May, 1913. Present: Hon. FRANK S. DIETRICH, Judge.

No. 557.

STEWART MINING COMPANY

vs.

BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY.

Order Consolidating Causes.

In accordance with stipulation on file in each cause, it is ordered that this cause and No. 558, Stewart Mining Company vs. Jonathan Bourne, Junior, and Lillien E. Bourne, and No. 563, Stewart Mining Company vs. Sierra Nevada Consolidated Mining Company, be consolidated for the purposes of trial, appeal and other proceedings in said cause. [24]

In the District Court of the United States, District of Idaho, Northern Division.

STEWART MINING COMPANY,
Complainant,

vs.

BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY,
Defendant.

STEWART MINING COMPANY,
Complainant,

vs.

JONATHAN BOURNE, Junior, and LILLIAN E. BOURNE,
Defendants.

STEWART MINING COMPANY,
Complainant,

vs.

SIERRA NEVADA CONSOLIDATED MINING COMPANY,
Defendant.

Stipulation of Facts.

WHEREAS, on the 12th day of May, 1913, the parties above named entered into a stipulation consolidating the three cases above named, and providing that the testimony, maps and exhibits, or copies and duplicates thereof, offered in a case commenced in the District Court of the First Judicial District of the State of Idaho, Shoshone County, wherein the Stewart [25] Mining Company was plaintiff and

the Ontario Mining Company and others were defendants, might be filed in the above-entitled causes, and

WHEREAS, it was further provided in said stipulation that either party in the above-entitled causes might offer additional testimony upon any subject not covered by the testimony to be filed as aforesaid, but that no more than three witnesses might be called on either side, and

WHEREAS, the parties to the causes above named now desire to avoid taking the testimony last above referred to, and to agree upon such facts as are not covered by the testimony above referred to, and to close the testimony in said cases:

NOW, THEREFORE, all the parties named on the first page of this stipulation hereby agree that the following facts are true and may be treated as admitted facts in each of the above named causes.

1. That the Stewart Mining Company is now, and was at the time of the commencement of the suits above named, the owner of the Stewart Fraction lode mining claim for which it holds patent from the United States; The Bunker Hill & Sullivan Mining and Concentrating Company is the owner of the Silver Casket mining claim, Survey No. 790, the Saxon lode mining claim, Survey No. 2067, the Marion lode mining claim, Survey No. 2583, and the Ace lode mining claim, Survey No. 2583, and the southerly triangular portion of the Lazy Jean quartz mining claim, Survey No. 1858, all of said claims being patented mineral claims; that the Silver Casket lode claim adjoins the Senator Stewart lode claim on

the south, its side lines having a northwesterly and southeasterly course and its end line a northeasterly and southwesterly course; the Saxon lode claim has a length of 1445.3 feet and a width of 603.6 feet, and the northwest corner of said claim is upon the Senator Stewart lode claim, [26] the southwest corner is upon the Silver Casket lode claim, the southeast corner is southeasterly from the southeast corner of the Ontario lode claim, and its northeast corner is upon the Switchback claim; the free ground within said claim consists of an irregularly shaped fraction west of the Ontario lode claim and south of the Senator Stewart lode claim and another irregularly shaped fraction south of the Ontario lode claim, and another irregularly shaped fraction east of the Ontario and Ontario Fraction lode claims; the Marion and Ace lode claims embrace fractions south of the southeast corner of the Silver Casket lode claim.

2. The Ontario lode mining claim is owned by Jonathan Bourne, Junior, is a patented lode mining claim, and is the same claim which was frequently referred to in the testimony which will be filed in the above-entitled causes in pursuance of the stipulation above referred to.

3. The Sierra Nevada and Carbonate lode mining claims lie a short distance south of the Ontario lode mining claim, but neither of said claims adjoins the Ontario. The Sierra Nevada and Carbonate claims are owned by the Sierra Nevada Consolidated Mining Company, and have been patented for more than twenty years.

4. On August 31st, 1904, the Stewart Mining Com-

pany conveyed to the Federal Mining and Smelting Company, and the latter company in May, 1910, conveyed to the Bunker Hill & Sullivan Mining & Concentrating Company, a triangular portion of the Lazy Jean lode mining claim, which portion lies west of the Ontario lode mining claim and is described as follows:

> "Beginning at Corner No. 5 Lazy Jean Lode Claim Survey No. 1858, thence North 24° 38′ East 305 feet to the side line of the Saxon Lode Claim, thence south 64 East 122.5 feet to line 4–5 Lazy Jean Lode, Survey No. 1858, thence south 50° 33′ West 380.3 feet to place of beginning." [27]

5. That the deed from the Stewart Mining Company to the Federal Mining and Smelting Company conveying said triangular portion of the Lazy Jean lode as aforesaid, after describing the said ground as aforesaid, contained the following language:

> "Together with all dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also, all and singular, the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title and interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of

the first part, of, in and to the said premises, and every part and parcel thereof, with the appurtenances."

A copy of said deed is attached hereto, marked Exhibit "A" and made a part hereof.

6. That the deed from the Federal Mining and Smelting Company to the Bunker Hill & Sullivan Mining and Concentrating Company above referred to conveyed all of its rights and property in and to the said Lazy Jean lode.

7. It is further stipulated and agreed that the vein which was the subject of controversy in the case of the Stewart Mining Company against the Ontario Mining Company passes beneath the triangular portion of the Lazy Jean lode claim, the Saxon, the Marion, Ace, Silver Casket, Ontario, Sierra Nevada and Carbonate lode mining claims, and the boundaries and position of said claims are correctly shown upon the maps filed herein.

8. The Silver Casket mining claim was located in the year 1885; the Ontario in 1885; the Sierra Nevada and Carbonate in 1886; the Stewart Fraction in 1899; the Saxon in 1899; the Marion and Ace in 1909.

9. It is further stipulated that the foregoing facts together with the testimony and exhibits to be filed herein in pursuance of the stipulation of the parties made on May 12th, 1913, shall constitute the entire evidence to be used in each [28] of the above-entitled causes; and each of the above cases shall be deemed closed and ready for argument upon the filing of the stipulation, and a copy of the testimony and such of the exhibits or copies or duplicates there-

of as either party may deem material and no witnesses shall be called by either side.

Dated this 24th day of November, 1913.

GUNN, RASCH & HALL,
CULLEN, LEE & MATTHEWS,
Counsel and Solicitors for Stewart Mining Company.

CURTIS H. LINDLEY, and
MYRON A. FOLSOM,
Counsel and Solicitors for Bunker Hill and Sullivan Mining and Concentrating Company.

CURTIS H. LINDLEY, and
MYRON A. FOLSOM,
Counsel and Solicitors for Sierra Nevada Consolidated Mining Company.

MYRON A. FOLSOM,
Counsel and Solicitor for Jonathan Bourne, Jr., and Lillian E. Bourne. [29]

EXHIBIT "A."

DEED TO MINING CLAIM.

THIS INDENTURE, made this 31st day of August, A. D. 1904, between Stewart Mining Company, a corporation, party of the first part, and Federal Mining and Smelting Company, a corporation, party of the second part:

WITNESSETH: That the said party of the first part, for and in consideration of the sum of One ($1.00) Dollars lawful money of the United States of America, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quitclaimed and by these presents does

grant, bargain, sell, remise, release and forever quit-claim unto said party of the second part, and to its heirs and assigns all of the following described real estate situated in Yreka Mining District, Shoshone County, Idaho, to wit:

> All that part of the Lazy Jean Lode Mining Claim, Survey No. 1858, in conflict with the Saxon Lode Mining Claim, the property of the party of the second part, the portion of the said Lazy Jean Lode by this instrument transferred, being more particularly described as follows: to wit: Beginning at Corner No. 5 Lazy Jane Lode Claim Survey No. 1858; Thence N. 24° 38′ E. 355 feet to the N. side line of Saxon Lode: Thence S. 64° E. 122.5 feet to line 4–5 Lazy Jane Lode, Survey No. 1858; Thence S. 50° 33′ W. 280.3 feet to the place of beginning. Containing 358 acres, more or less.

Together with all dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also, all and singular, the tenements, herditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party [30] *party* of the first part, of, in and to the said premises and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors and assigns forever.

IN WITNESS WHEREOF, the said corporation has its president to sign its name and affix his name as president and has caused the secretary to attest the same and attach the corporate seal of the corporation hereto.

[Corporate Seal]

STEWART MINING COMPANY,
By H. F. SAMUELS, [Seal]
President.
W. N. MORPHY, [Seal]
Secretary.

Duly acknowledged by H. F. Samuels as president.

[Endorsed]: Filed Nov. 24, 1913. A. L. Richardson, Clerk. [31]

In the District Court of the United States for the District of Idaho, Northern Division.

No. 563.

STEWART MINING COMPANY,
Plaintiff,
vs.
SIERRA NEVADA CONSOLIDATED MINING COMPANY,
Defendant.

Decision.

Jan. 16, 1914.

GUNN, RASCH & HALL, HAPPY, CULLEN, LEE & HINDMAN, CULLEN, LEE & MATTHEWS, and FEATHERSTONE & FOX, Counsel and Solicitors for Plaintiff.

CURTIS H. LINDLEY and MYRON A. FOLSOM, Counsel and Solicitors for Defendant.

DIETRICH, District Judge:

For the reasons stated in the opinion this day filed in No. 558, Stewart Mining Company vs. Jonathan Bourne, Jr., et ux., the complaint herein will be dismissed.

[Endorsed]: Filed January 16, 1914. A. L. Richardson, Clerk. [32]

In the District Court of the United States, for the District of Idaho, Northern Division.

STEWART MINING COMPANY, a Corporation, Complainant,

vs.

SIERRA NEVADA MINING COMPANY, a Corporation, Defendant.

Judgment of Dismissal.

This cause came on for final hearing before the Court, and the Court upon due consideration of the bill, the answer, the replication, the evidence and the arguments of counsel, doth now

ORDER, ADJUDGE AND DECREE that this suit be and the same is hereby dismissed with costs to the defendant to be taxed.

Dated this 31st day of January, 1914.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed January 31, 1914. A. L. Richardson, Clerk. [33]

In the District Court of the United States for the District of Idaho, Northern Division.

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

SIERRA NEVADA MINING COMPANY, a Corporation,
Defendant.

Assignments of Error.

Now comes the Stewart Mining Company, plaintiff in the above-entitled cause, and says that the United States District Court for the District of Idaho erred in its decision and decree in said cause, as appears from the record therein, and that the errors committed are as follows, to wit:

1. The said Court erred in holding and deciding that the edge or termination of the vein along the Osborn fault beneath the surface of the Senator Stewart Fraction claim is not a top or apex within the meaning of those terms as used in section 2322 of the Revised Statutes of the United States.

2. The said Court erred in holding and deciding that the top or apex of said vein is not so situated with reference to the Senator Stewart Fraction claim as that plaintiff has an extralateral right to that section of the vein beneath the Carbonate and Sierra Nevada mining claims between the vertical planes of the end lines of the Senator Stewart Fraction claim extended.

3. The said Court erred in holding and deciding that the course pursued in following on the vein from the edge or [34] termination thereof along said Osborn fault beneath the surface of the Senator Stewart Fraction claim along vertical planes parallel with the vertical plane of the end line of said claim extended to the part of the vein beneath the Carbonate and Sierra Nevada mining claims is not a downward course within the meaning of the words "downward course" and "course downward" as the same appears in section 2322 of the Revised Statutes of the United States.

4. The Court erred in holding and deciding that the question whether the termination or edge of the vein along the Osborn fault is a top or apex thereof should be determined without reference to the situation of the Senator Stewart Fraction claim, or the boundary lines thereof.

5. The said Court erred in holding and deciding that the plaintiff has no extralateral right to that section of the vein beneath the surface of the Carbonate and Sierra Nevada quartz lode mining claims within the vertical planes of the end lines of the Senator Stewart Fraction claim extended.

6. The said Court erred in holding and deciding that the plaintiff is not the owner of that section of the vein beneath the Carbonate and Sierra Nevada claims between the vertical planes of the end lines of the Senator Stewart Fraction claim extended.

7. The said Court erred in rendering a decree dismissing the bill of complaint in said cause.

WHEREFORE, the plaintiff, the Stewart Mining Company, prays that for the errors aforesaid and other errors appearing in the record in said cause to its prejudice that the said decree may be reversed.

GUNN, RASCH & HALL,
CULLEN, LEE & MATTHEWS,
Solicitors for Plaintiff Stewart Mining Company.

[35]

Due service acknowledged this 17th day of March, 1914.

C. H. LINDLEY,
M. A. FOLSOM,
Attorneys for Defendant.

[Endorsed]: Filed March 19, 1914. A. L. Richardson, Clerk. [36]

In the District Court of the United States for the District of Idaho, Northern Division.

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

SIERRA NEVADA MINING COMPANY, a Corporation,
Defendant.

Petition for Order Allowing Appeal.

Comes now the above-named plaintiff, the Stewart Mining Company, and conceiving itself to be aggrieved by the decree made, rendered and entered in the above-entitled cause, on the 31st day of January, 1914, wherein and whereby it was ordered, adjudged and decreed that the bill of complaint therein be dismissed, hereby petitions for the allowance of an appeal from said decree to the United States Circuit Court of Appeals pursuant to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the said plaintiff should give and furnish upon said appeal.

And your petitioner will forever pray, etc.

GUNN, RASCH & HALL,
CULLEN, LEE & MATTHEWS,
Solicitors for Plaintiff, Stewart Mining Company.

Due service acknowledged this 17th day of March, A. D. 1914.

C. H. LINDLEY,
M. A. FOLSOM,
Attorneys for Defendants.

[Endorsed]: Filed March 19, 1914. A. L. Richardson, Clerk. [37]

In the District Court of the United States for the District of Idaho, Northern Division.

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

SIERRA NEVADA MINING COMPANY, a Corporation,
Defendant.

Order Allowing Appeal, etc.

The petition of the Stewart Mining Company, plaintiff in the above-entitled cause, for an order allowing an appeal from the decree rendered and entered in said cause, on the 31st day of January, 1914, together with assignments of error having been filed herein:

IT IS ORDERED that an appeal be and the same is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered in said cause; and that the amount of bond upon said appeal be and the same is hereby fixed at the sum of $500; and that a certified transcript of the records and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

Dated this 19th day of March, 1914.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed March 19, 1914. A. L. Richardson, Clerk. [38]

In the District Court of the United States for the District of Idaho, Northern Division.

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

SIERRA NEVADA MINING COMPANY, a Corporation,
Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Stewart Mining Company, as principal, and United States Fidelity & Guaranty Co., as surety, are held and firmly bound unto Sierra Nevada Mining Company, in the full and just sum of $500 to be paid to the said Sierra Nevada Mining Company, its successors and assigns, for which payment well and truly to be made we bind ourselves and our successors and assigns, jointly and severally, firmly by these presents.

Dated this 19th day of March, 1914.

WHEREAS, the Stewart Mining Company, plaintiff in the above-entitled cause, has taken an appeal to the Circuit Court of Appeals for the Ninth Circuit to reverse the decree rendered and entered in said cause by the above-entitled court, dismissing the complaint therein and for costs.

NOW, THEREFORE, the condition of this obligation is such that if the said Stewart Mining Company shall prosecute said appeal to effect, and answer all damage and costs, if it shall fail to make good its

plea, then this obligation shall be [39] void; otherwise to remain in full force and effect.

STEWART MINING COMPANY,
By W. E. CULLEN,
Its Attorney.

UNITED STATES FIDELITY & GUARANTY CO.,
[Corporate Seal] By R. L. WEBSTER,
Its Attorney in Fact.

The foregoing bond is approved this 19th day of March, 1914.

FRANK S. DIETRICH,
United States District Judge.

[Endorsed]: Filed March 19, 1914. A. L. Richardson, Clerk. [40]

In the District Court of the United States for the District of Idaho, Northern Division.

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

SIERRA NEVADA MINING COMPANY, a Corporation,
Defendant.

Praecipe [for Transcript of Record on Appeal].

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the entire record in said cause, omitting therefrom the testimony and evidence, and transmit the same with your certificate to the clerk of the United States Circuit

Court of Appeals at San Francisco. You will also please transmit with the record the original citation in said cause.

In your certificate please recite and certify that the testimony and exhibits in said cause are the same as in cause No. 558, in which the Stewart Mining Company, is plaintiff, and Jonathan Bourne, Jr., and Lillian E. Bourne, are defendants, said two causes and cause No. 557, in which the Stewart Mining Company, is plaintiff, and the Bunker Hill & Sullivan Mining & Concentrating Company, is defendant, having been consolidated as per stipulation, constituting a part of the record in each of said causes and that the said testimony and exhibits have been certified and transmitted to the clerk of the Circuit Court of Appeals at San Francisco pursuant to the orders made and entered in said cause No. 558, in which [41] Jonathan Bourne, Jr., and Lillian E. Bourne, are defendants as aforesaid.

Dated this 19th day of March, 1914.

GUNN, RASCH & HALL,
CULLEN, LEE & MATTHEWS,
Solicitors for Appellant.

[Endorsed]: Filed March 19, 1914. A. L. Richardson, Clerk. [42]

Citation [on Appeal (Original)].

UNITED STATES OF AMERICA,—SS.

The President of the United States to Sierra Nevada Mining Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Ap-

peals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the clerk's office of the United States District Court for the District of Idaho at Boise City, Idaho, in that certain suit numbered 563 in which Stewart Mining Company, a corporation, is plaintiff and appellant, and you are defendant and respondent, to show cause, if any there be, why the decree rendered against said Stewart Mining Company, plaintiff and appellant, as in the said order allowing the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable FRANK S. DIETRICH, United States District Judge for the District of Idaho, this 19th day of March, 1914.

FRANK S. DIETRICH,
United States District Judge for the District of Idaho.

[Seal] Attest: A. L. RICHARDSON,
Clerk of United States District Court for the District of Idaho.

Service of the foregoing citation admitted and receipt of copy acknowledged this 21st day of March, 1914.

CURTIS H. LINDLEY,
MYRON A. FOLSOM,
A. W.
Solicitors for Defendant and Respondent. **[43]**

[Endorsed]: No. 563. In the District Court of the United States for the District of Idaho, Northern Di-

vision. Stewart Mining Company, a Corporation, Plaintiff, vs. Sierra Nevada Mining Company, a Corporation, Defendant. Citation. Filed March 23, 1914. A. L. Richardson, Clerk. [44]

[Certificate of Clerk U. S. District Court to Transcript of Record on Appeal.]

In the District Court of the United States for the District of Idaho, Northern Division.

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

SIERRA NEVADA MINING COMPANY, a Corporation,
Defendant.

I, A. L. Richardson, Clerk of the above-entitled court, do hereby certify that the foregoing, from page 1 to page 45, inclusive, is a complete and true transcript of the records and proceedings in the above-entitled cause, with the exception of the testimony and exhibits as appears from the papers and records in said cause on file in my office.

I further certify that the testimony and exhibits in said cause are the same as the testimony and exhibits in cause No. 558, in which the Stewart Mining Company, is plaintiff, and Jonathan Bourne, Jr., and Lillian E. Bourne, are defendants, and that said testimony and exhibits have been certified and transmitted to the clerk of the United States Circuit Court of Appeals at San Francisco, pursuant to the orders made and entered in said cause No. 558.

I further certify that there is attached to said transcript the original citation issued in the above-entitled cause.

WITNESS my hand and the seal of said court this 25th day of March, 1914.

[Seal] A. L. RICHARDSON,
Clerk of the United States District Court for the District of Idaho. [45]

[Endorsed]: No. 2391. United States Circuit Court of Appeals for the Ninth Circuit. Stewart Mining Company, a Corporation, Appellant, vs. Sierra Nevada Mining Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

Received and filed March 30, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

STEWART MINING COMPANY, a corporation,
Appellant,

vs.

SIERRA NEVADA MINING COMPANY, a corporation,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF FACTS.

This is a suit to quiet title. The plaintiff and appellant alleges ownership and possession of the Senator Stewart Fraction Quartz Lode mining claim; that within said claim is a vein, the top or apex of which extends from the easterly end line of the claim in a westerly direction through said

claim for a distance of approximately 705 feet to and across the southerly side line of the claim; and that such vein has a downward course from the apex and descends into the earth southerly beneath the Sierra Nevada and Carbonate Quartz Lode mining claims, the property of the defendant and appellee. The appellant asserts an extralateral right to the section of said vein beneath the Sierra Nevada and Carbonate claims within planes drawn downward through the end lines of the Senator Stewart Fraction claim extended. (Record p. 1.) The boundaries and situation of the claims referred to are shown on the maps in evidence in the case.

The answer (Record p. 19) denies that any vein having its apex within the Stewart Fraction claim extends beneath the Sierra Nevada and Carbonate claims. The answer also alleges an exception in the patent to the Stewart Fraction claim of that part of the claim in conflict with the Quaker Quartz Lode mining claim. The area excepted is shown by the maps in evidence and it is admitted that the exception is not material to any issue in this case.

It was stipulated that the appellant is the owner and in possession of the Steward Fraction claim and the defendant is the owner and in possession of the Serra Nevada and Carbonate claims. It was further stipulated that United States patents have issued for all of said claims and that the boundaries and situation of the claims are corerctly shown upon

the maps introduced in evidence. It was also stipulated that the vein in controversy passes beneath the Sierra Nevada and Carbonate claims. (Record pp. 26-30.)

The case was pursuant to stipulation, (Record p. 22) heard and decided by the lower court on the evidence in the case of the Stewart Mining Company vs. the Ontario Mining Company, et al., 132 Pac. 787, supplemented by an agreement as to certain facts. (Record p. 26.)

The defendant and appellee is not asserting any apex right to the section of the vein in controversy. It makes no claim to the apex of the vein, but denies the extralateral right of the appellant and relies upon the prima facie presumption of ownership of the mineral beneath the surface of the Sierra Nevada and Carbonate claims.

In view of the pleadings, stipulation and admitted facts, the only question is whether the appellant has the right of lateral pursuit of the vein beneath the Sierra Nevada and Carbonate claims.

The case was consolidated with the case of the Stewart Mining Company vs. Jonathan Bourne, Jr. and Lillian E. Bourne, his wife, "for the purpose of trial, appeal and other proceedings in said cause." (Record p. 23.) The court decided the case against appellant for the reasons stated in the opinion filed in the case of the Stewart Mining Company vs. Jonathan Bourne, Jr., et ux. (Record p. 34.)

The lower court found and decided that the easterly and westerly termination of the vein in the Stewart Fraction claim is not an apex within the meaning of the term as used in Section 2322 of the Revised Statutes of the United States, and for this reason the appellant was denied an extralateral right to the section of the vein beneath the Sierra Nevada and Carbonate claims. Because of this finding and decision the complaint was dismissed and the appeal is from the decree which was entered accordingly.

SPECIFICATIONS OF ERROR.

1. The lower court erred in finding and deciding that the easterly and westerly termination of the vein in the Stewart Fraction claim is not an apex.

2. The court erred in deciding that the appellant has no extralateral right to, and is not the owner of, the section of the vein beneath the Sierra Nevada and Carbonate claims.

* * * * * *

As the extralateral right asserted by appellant is dependent upon the same facts and conditions which are made the basis of the extralateral right claimed in the case of the Stewart Mining Com-

pany vs. Jonathan Bourne, Jr., et ux, which is now before this court on appeal, and in view of the fact that the lower court denied the claim of appellant to an extralateral right in this case for the reasons stated in the opinion in the case against Jonathan Bourne and wife, we refer to the brief for appellant in that case for a discussion of the facts and of the law applicable to same.

Respectfully submitted,

C. S. THOMAS,
CULLEN, LEE & MATTHEWS,
and GUNN, RASCH & HALL,
Solicitors for Appellant.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STEWART MINING COMPANY (a corporation),
Appellant,
vs.
BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY (a corporation),
Appellee.
No. 2389.

STEWART MINING COMPANY (a corporation),
Appellant,
vs.
JONATHAN BOURNE, Jr., and LILLIAN E. BOURNE, his wife,
Appellees.
No. 2390.

STEWART MINING COMPANY (a corporation),
Appellant,
vs.
SIERRA NEVADA MINING COMPANY (a corporation),
Appellee.
No. 2391.

STATEMENT OF THE CASE.

The three cases above entitled were, by order of Court pursuant to stipulations filed in the trial court, consolidated for the purpose of trial, appeal, and other proceedings.

Transcript, No. 2389, p. 21.
Transcript, No. 2390, p. 30.
Transcript, No. 2391, p. 25.

All of the causes were submitted to the trial court upon the evidence taken in an action theretofore pending in the District Court of the First Judicial District of the State of Idaho, for Shoshone County, wherein the Stewart Mining Company was plaintiff, and the Ontario Mining Company and others, lessees of Jonathan Bourne, Jr. and Lillian E. Bourne, were defendants, the Bournes being appellees in the cause now before this Court, numbered 2390.

The suits were brought to quiet title to the underground parts of a vein underneath the surface of the Silver Casket, Saxon, Marion, Lazy Jean and Ace mining claims owned by the Bunker Hill & Sullivan Mining and Concentrating Company, the Ontario claim owned by Jonathan Bourne, Jr. and Lillian E. Bourne, his wife, and the Sierra Nevada and Carbonate claims owned by the Sierra Nevada Mining Company, such underground parts of the vein in dispute being alleged by appellant, Senator Stewart Mining Company, to appertain to and form a part of the

vein having its apex within the appellant's mining claim called the Senator Stewart Fraction.

The relative situation of these various properties and the situs of the apex, as established at the trial and found by the State Courts and the United States District Court for the State of Idaho in causes here pending, are shown on the map marked Figure 1 and herewith inserted.

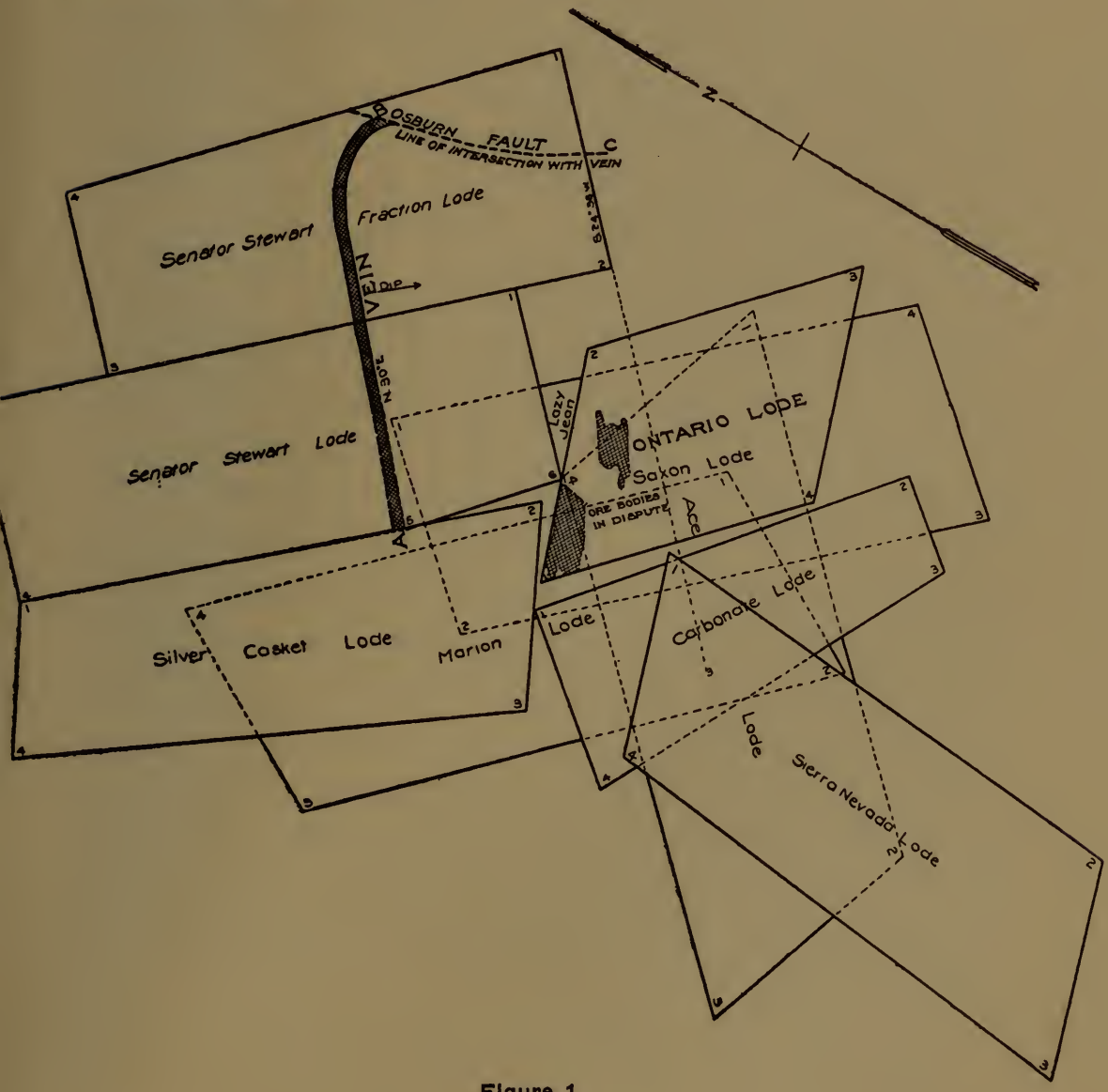

Figure 1.

The facts upon which the decisions of the Court below were made were developed through evidence taken in the State Court, where the controversy was confined to the conditions existing in the Senator Stewart Fraction claim of the Appellant, and the Ontario claim of the Appellees, Bourne and wife, which evidence forms a part of the record in cause No. 2390.

The record upon which the cases were tried does not disclose the state of development on the vein underneath the surface of any of the properties of either the Bunker Hill & Sullivan Mining and Concentrating Company, Appellee in cause No. 2389, or the Sierra Nevada Mining Company, Appellee in cause No. 2391. This development is negligible as to these properties. With the vein in position as disclosed in the record in the State Court in *Stewart Company* vs. *Ontario Company,* which was by stipulation made the record in all three of the causes here pending, the position of the vein underneath the Silver Casket, Saxon, Marion, Lazy Jean and Ace claims of the Bunker Hill & Sullivan M. & C. Co. and the Sierra Nevada and Carbonate claims of the Sierra Nevada Mining Company may be inferred.

The accompanying Figure 2 will illustrate the facts as found by both State and Federal Courts in the Stewart-Ontario Case, and for all practical purposes will suffice as the basis of discussion of the three causes above entitled.

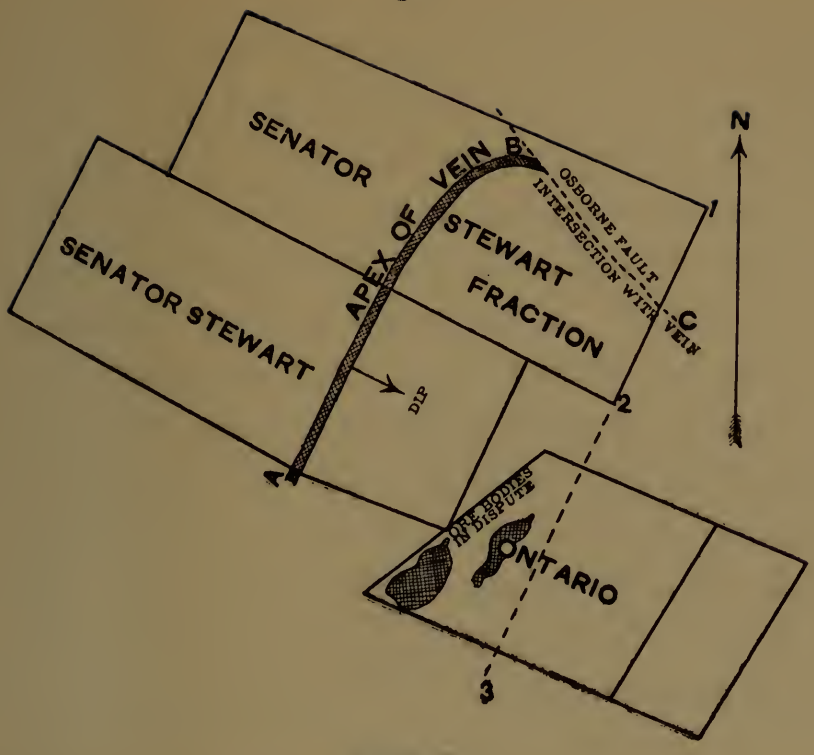

Figure 2.

This figure is substantially the same as the one used by the Court below in its decision appearing at page 40 of the transcript, Cause No. 2390.

We are not here concerned with rights flowing from the Senator Stewart claim.

Appellant rests its claim in these actions upon its ownership of the Senator Stewart Fraction claim, asserting an extralateral right to follow the vein outside of the boundaries of that claim, thus claiming the ownership of all the outside parts of the vein lying to the west of a vertical plane drawn through the easterly boundary line of the Stewart Fraction claim, the line 1-2-3 on Figure 2 extended indefinitely southerly. This includes the ore bodies in dispute underneath the Ontario claim, and the segments of the vein underneath the properties of the Appellees, Bunker Hill &

Sullivan M. and C. Co. and the Sierra Nevada Mining Company which are shown on Figure 1 *ante*.

The facts as illustrated on Figure 2 are practically conceded. The general course of the vein along the line nearest to the surface is from A to B. This apex does not appear at the surface, but is "blind." At B the course is interrupted by a great fault, designated on Figure 2 as the Osborne Fault. The plane of this fault dips to the Southerly and Westerly, intersecting and under cutting the plane of the vein.

It is somewhat difficult to exhibit this situation through the medium of an isometric figure, but an attempt has been made to produce a stereogram (Figure 3), which conveys a more or less accurate conception of the situation.

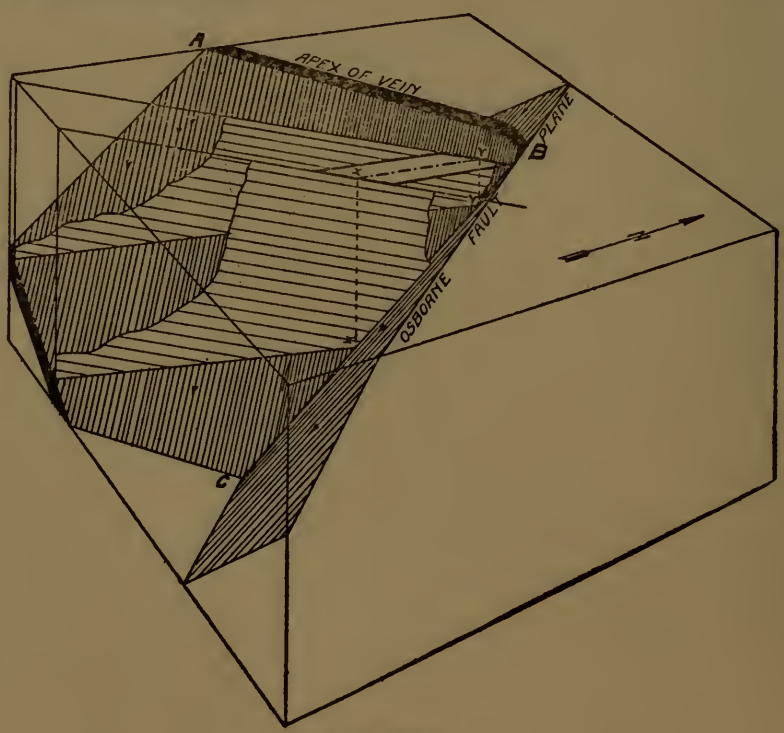

Figure 3.

The contention of the Appellant in the cases at bar is idealized by location X-Y as indicated on the Figure 3. From no portion of the end edge of the vein covered by this location is there any dip, and hence there is no apex contained therein on which to predicate an extralateral right.

An inspection of the large model, Defendant's Exhibit L, and the plan map, Defendant's Exhibit B, will demonstrate the conditions as nearly as they can be reproduced on a small scale.

The contention of Appellant in the case in the State Court in the Ontario case, and in the cases at bar, is that the line of intersection of the vein with the fault plane is an apex; in other words, the apex of the vein on Figures 2 and 3 is the entire underground exposure A-B-C.

The State trial Court decided that this line of intersection of the fault with the vein represented on the Figures 2 and 3 by the line B-C, was not the top or apex, but the side edge of the vein, and held that no extralateral right could be predicated on it. This decision was affirmed by the Supreme Court of Idaho.

Stewart Mining Co. vs. *Ontario M. Co.,* 132 Pac., 787; 23 Idaho, 724.

The Court below in the trial of the causes at bar reached the same conclusion.

Transcript, No. 2390, pp. 38-47.

As stated by the trial Court in its opinion, this is the cardinal question in these cases.

These appeals are prosecuted to secure a reversal of this finding. The assignments of error presented for consideration by this Court are reduced to three in number, all of which, however, are predicated on this finding and the legal result flowing therefrom.

The evidence does not disclose the existence of any other vein within the Stewart Fraction claim. If the vein A-B shown on Figure 2 is the discovery vein, it would seem obvious that the side lines would become the end lines, as the vein crosses one of these lines practically at a right angle, and terminates against the Osborne Fault before reaching the other complementary line. Under this state of facts, if the two lines were parallel the Appellant might follow the vein on its downward course easterly within the extended side-end-line planes.

Flagstaff M. Co. vs. *Tarbet,* 98 U. S., 463, 468;
Del Monte M. & M. Co. vs. *Last Chance,* 171 U. S., 55;
Last Chance M. Co. vs. *Bunker Hill & S.,* 131 Fed., 579.

These side-end-lines, however, are not parallel, and there could be in this instance no extralateral right.

Appellant tried the case upon the theory that a patent having been issued in the form shown on the figure, the Court would presume that it was based

upon an original or discovery vein running lengthwise of the claim; that upon this presumption unaided by any proof it would be presumed that the vein here in question was a secondary vein to which the presumed end lines on the original should be applied. Appellee's contention is that this presumption may be indulged in as to all intralimital rights, but when the owner of a claim extends his workings beyond his vertical boundaries and invades another's territory, he must show all the facts upon which his extralateral right is predicated, and no presumptions are indulged in as against the owner of the invaded territory, who until the invasion occurs has no opportunity for his "day in court."

Considering the conceded facts of this case, we incline to the view that a discussion of this question is not necessary.

We will, however, after we shall have presented our views on the cardinal question in the case, state our position *in extenso* as to the contention of Appellant, which is elaborately discussed in its brief.

ARGUMENT.

The decisions of the trial Court are based upon the finding of an ultimate fact, that the segment of the vein which Appellant contends is an apex is not in fact an apex, but the side edge of the vein.

What constitutes an apex in a legal sense may be said to be a proposition of law. But ordinarily

whether a given exposure of a developed vein is or is not an apex is a question of fact.

Blue Bird Mining Co. vs. *Largey,* 49 Fed., 289, 291;
Illinois Silver M. Co. vs. *Raff,* 34 Pac., 544, 545.

As was said by Judge Knowles in *Blue Bird M. Co.* vs. *Largey, supra:*

> "As to what is the 'top' or 'apex' of a vein is also a question of fact and not of law. . . . There is an issue it appears as to whether or not the apex of the Blue Bird vein is cut by the end line or side line of the Blue Bird claim. This is an issue of fact to be determined by the evidence."

The finding of the trial Court upon a question of fact would, generally speaking, be accepted by this Court as final in the absence of a showing that there was no evidence upon which the finding could be based.

But we apprehend that the gravamen of Appellant's contention in this behalf is that the Court misapplied the law to the conceded facts of the case. We will proceed to discuss this aspect of the case.

WHAT CONSTITUTES AN APEX.

If we may assume an ideal vein outcropping at the surface, descending into the earth on its downward course, and an abrasion of the side of the mountain so

as to expose the vein, we would have the result illustrated upon Figure 4.

Figure 4.

There can certainly be no question as to which part of the exposed vein shown on Figure 4 is the apex. The exposure A-B is obviously not an apex, but a side edge.

Locations might be made along A-B and the end lines given such a direction as to enable the locator to pursue the vein in a downward direction, but this would not constitute the exposure A-B an apex, or confer any extralateral right. It would still be a side edge. As determined by the trial Court in the causes at bar, and by the State Courts in the Ontario suit, there is presented a state of facts parallel to those exhibited on Figure 4.

Of all the definitions as to what constitutes an apex, we think the well known presentation of the question by Mr. Ross E. Browne is most instructive. The numbering of illustrations accompanying the presentation of Mr. Browne's views is here changed so as to follow the consecutive numbering of illustrations in this brief.

In other respects we quote Mr. Browne's language. Said Mr. Browne:

"The vein is limited in extent. It terminates horizontally, upward, and ultimately downward. Let Figure 5 represent in isometric projection, the

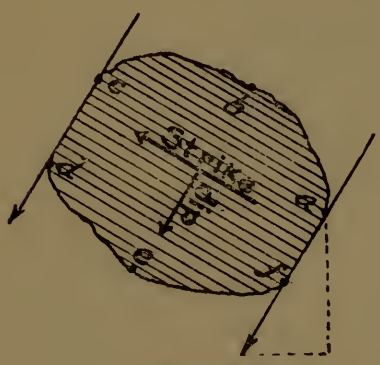

Figure 5.

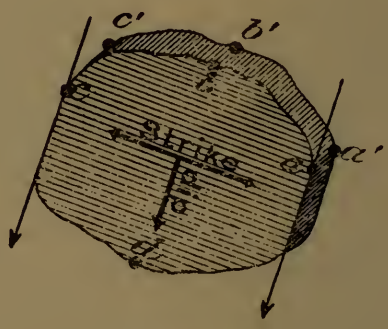

Figure 6.

plane of an ideal narrow vein, comparable with a sheet of paper. The line a-b-c-d-e-f represents the terminal edge, with tangent dip-lines at a and c. Then a-b-c is the top edge or apex, a-f and c-d are the side edges, and d-e-f is the bottom edge. From any point of the apex a-b-c the vein may be followed downward in the direction of its true dip. From the bottom edge d-e-f the vein does not extend further downward. Hence the definition which follows: 'The apex is all that portion of the terminal edge of the vein from which the vein has extension downward in the direction of its dip.' But a vein is not generally so thin as a sheet of paper; it has a material and widely varying thickness, and its apex is a surface rather than an edge. The above definition may then apply more strictly to the lateral boundaries or walls of the vein, and the apex of the vein itself may be described as the surface included between the apices of its lateral boundaries a-b-c-c'-b'-a', on Figure 6."

If we assume that the large model, Defendant's Exhibit L, exhibiting the mine workings and the position of the vein in the ground to be correct, and as to this there is no dispute, we have practically a reproduction of Mr. Browne's illustration and definition. If this model is taken as a representation of the facts reproduced in miniature, about which there can be no question, "the thing speaks for itself."

The line A-B in Figures 1 and 2 fulfils exactly Mr. Browne's definition of "apex," and the line B-C is the "side edge" indicated on the Browne illustration Figure 5 by the tangent line a-f.

The distinction between an apex and side edge of a vein was discussed extensively by the Supreme Court of Dakota in the case of *Duggan* vs. *Davey,* 26 N. W., 887, 4 Dak., 110, 17 Morr. Min. Rep., 59. The opinion in this case is both interesting and instructive.

The decision follows, in the main, the opinion given by the trial Court. It is a lucid and masterly presentation of the law, and, as presented, affords us an opportunity to illustrate and explain by diagrams the position of the vein in the earth, its exposure on both top and side, the contention of the respective parties as to what constituted the apex, and the conclusions of the Court deduced from the facts. It is one of the few cases which affords a full opportunity of explaining by simple methods the true definition of the term "top," or "apex," as well as the "strike" and "dip," and their relationship one to the other. Entertaining

these views as to the importance of the case, we are justified in presenting it fully.

Figure 7.

Figure 7 is a perspective, showing an edge or outcrop of the vein exposed along the western face of Custer Hill, traversing it in a northerly and southerly direction, and an edge or outcrop traversing the northern slope in an easterly and westerly direction. We take the following description from the opinion of the trial Court:

The western slope of the hill presents a lateral face from south to north, along the line of the outcrop, of thirteen hundred feet. At its northern extremity it turns to the east, and its northern slope presents a lateral face from west to east of upward of three thousand feet. Along its base and following it in this turn in the direction indicated is a small stream called Bare Butte creek. These slopes are quite steep, and extend from base to summit about twelve hundred to thirteen hundred feet. The whole country is hilly and broken, and the hill is only one of a series of

similar elevations, with which it is more or less directly connected.

Beginning at or near the southern extremity of the western slope of Custer Hill, at a point (marked x on Figure 7) halfway up the slope, there is found an outcropping layer or stratum of reddish quartzite, or metamorphic sandstone, of several feet in thickness, overlaid by a body or stratum of limestone or dolomitic shale, of a thickness not definitely ascertained. From this point the croppings may be readily traced in several places by high reef-like ledges, jutting out boldly from the face of the hill along the western face to its northern extremity.

The general bearing of this line of croppings may be stated as N. 11° W., the distance twelve hundred and forty-three feet, and the angle of inclination upward from south to north, approximately, three degrees.

At the northern extremity of the hill this line of outcrop of quartzite, with its overlying limestone or dolomite, turns and extends along the northern slope with a downward inclination, thus gradually nearing the base of the hill until, at a distance of something over twenty-five hundred feet, it disappears beneath the bed of the creek.

The course of the outcrop along the northern slope of the hill is for a distance of nineteen hundred and fifty feet, N. 70° 30′ E., and the angle of declination eight degrees, from west to east.

The "vein" consists of the underlying quartzite, impregnated with iron and silver in various forms, the width of the so-called vein material not being uniform. The richer ore deposits are usually found along the contact with the overlying limestone.

The entire line of outcrop on both slopes of Custer Hill appears to have been appropriated by different locations, but the controversies in the case under consideration arose out of claims located on the northern slope. We present in Figure 8 a diagram showing the surface boundaries of the claims, the "vein exposure," and the underground workings, in horizontal projection.

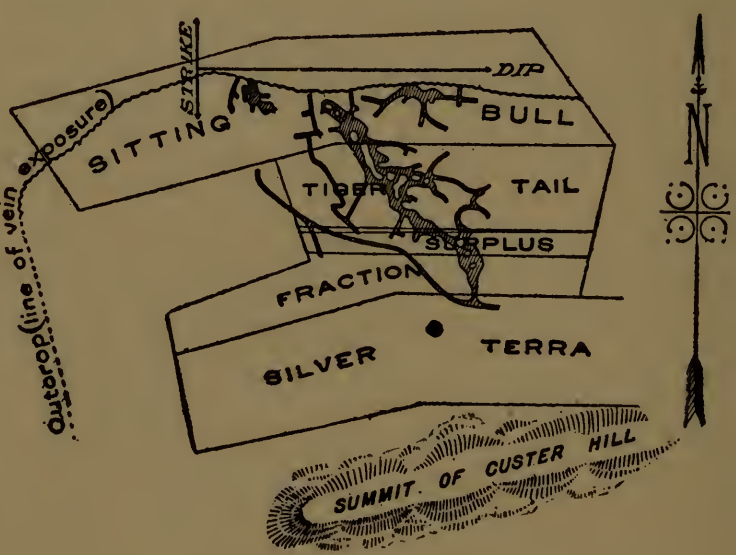

Figure 8.

From this figure it will appear that the Sitting Bull, belonging to the defendants, covers about thirteen hundred and eighty feet of the outcrop on the northern slope of the hill. Its end-lines are parallel, and if

this outcrop or vein exposure is the "top," or "apex," of the vein, the location approximates the ideal.

The plaintiffs owned the Silver Terra, some distance south and up the hill from the Sitting Bull. It does not appear upon what vein the Silver Terra location was based. It was not material for the purposes of the case that it should be shown. Both parties had lode patents for their respective claims. The Sitting Bull had, in following the vein southerly into the hill with its underground works, penetrated underneath the surface of the Silver Terra, whereupon the owners of that claim brought an action in equity to enjoin the owners of the Sitting Bull from trespassing within the boundaries of the Silver Terra.

The Sitting Bull justified its presence underneath the Silver Terra surface by asserting ownership of the apex of the vein, and its right to follow it between its end-line planes to an indefinite depth.

The principal question involved was:

> *Is the top, or apex, of this vein, or lode, within the lines of the Sitting Bull location?*

The Court below, in arriving at its conclusions, considered the relative angles of declination in determining which was the top, or apex, of the vein.

The strike and dip, so far as exposed in the underground workings, was testified to as follows: Witnesses for the Sitting Bull claimed the average strike to be N. 18 E. and the dip S. 72 E., seven and one-half

to eight degrees. Witnesses for the Silver Terra claimed the strike N. 8½ W. and the dip N. 81½ E., seven degrees. The Court found the strike to be north and south, and the dip east, at an angle of seven and one-half to eight degrees, as shown in Figure 8. This dip-line shows that the outcrop in the Sitting Bull location is substantially on the side edge of the vein not forming an apex. To be sure, a small part of the outcrop at the westerly end of the location is apex, according to our definition, but this is not the controlling part involved in the case.

As to what constitutes the "top," or "apex," of a vein, the Court expressed its view as follows:

> "The definition of the top, or apex, of a vein usually given is the end or edge of a vein nearest the surface; and to this definition the defendants insist we must adhere with absolute, literal, and exclusive strictness, so that wherever, under any circumstances, an edge of a vein can be found at any surface, regardless of all other circumstances, that is to be considered as the top, or apex, of the vein. The extent to which this view was carried by the defendants—and I must confess its logical results were exhibited by Professor Dickerman, their engineer, who, replying to an inquiry as to what would be the apex of a vein cropping out at an angle of one degree from the vertical, on a perpendicular hillside, and cropping out also at a right angle with that along the level summit of the hill, stated that, in his opinion, the whole line of that outcrop, from the bottom clear over the hill, so far as it extended, would be the apex of the vein. Some other witnesses had similar opinions. The definition given is no doubt correct,

under most circumstances, but, like many other definitions, is found to lack fullness and accuracy in special cases, and I do not think important questions of law are to be determined by a slavish adherence to this letter of an arbitrary definition.

"It is indeed difficult to see how any serious question could have arisen as to the practical meaning of the terms 'top,' or 'apex,' but it seems, in fact, to have become somewhat clouded. . . .

"Justice Goddard, a jurist of experience in mining law, in his charge to the jury in the case of *Iron S. M. Co.* vs. *Louisville,* defines 'top,' or 'apex,' as the highest or terminal point of a vein, where it approaches nearest the surface of the earth, and where it is broken on its edge so as to appear to be the beginning or end of the vein."

After quoting Judge Beatty's definition given to the public land commission, the Court continues:

"I am aware that in several adjudged cases 'top,' or 'apex,' and 'outcrop' have been treated as synonymous, but never, so far as I am aware, with reference to a case presenting the same features as the present. The word 'apex' ordinarily designates a point, and so considered the apex of a vein is the summit; the highest point in a vein is the ascent along the line of its dip, or downward course, and beyond which the vein extends no farther; so that it is the end, or, reversely, the beginning, of the vein. The word 'top,' while including 'apex,' may also include a succession of points,—that is, a line,—so that by the top of a vein would be meant the line connecting a succession of such highest points or apices, thus forming an edge."

Applying these definitions to the facts of the case under consideration, the Court below held that the

Sitting Bull location did not cover the top, or apex, of the vein. That the outcrop shown on the northern slope of Custer Hill was merely an exposure of the edge of the vein on the line of its dip, just as the exposure of the side edge of the ideal fissure vein represented in Figure 4 appearing in this brief, and in the illustrations 5 and 6 *ante,* accompanying Mr. Ross E. Browne's definition which we have discussed.

Judgment passed for the plaintiff. The Supreme Court of Dakota, adopting the views of the trial Court, affirmed the judgment. It was not in terms decided that the outcrop on the west slope of the hill was the top, or apex, of the vein. It was not necessary to do so in order to defeat the extralateral right claimed by the Sitting Bull. But if the owner of a location covering the outcrop on the western slope should pursue his vein easterly with his underground works so as to intersect the workings of the Sitting Bull, showing identity and continuity, and establishing that the angles of declination disclosed in such workings were the same as in the case proved, the conclusion is irresistible that the western outcrop would be the true apex of the vein, and this is in consonance with the rule applied to veins of steeper inclination.

Mr. Costigan in his work on *Mining Law,* page 138, gives these deductions from the opinion of the Court in the Duggan-Davey case his approval.

The Idaho case of *Gilpin* vs. *Sierra Nevada Cons. M. Co.* (2 Idaho, 362; 23 Pac., 547; 17 Morr. Min.

Rep., 310), shows a state of facts similar to that appearing in the South Dakota case, and is illustrated on Figure 9.

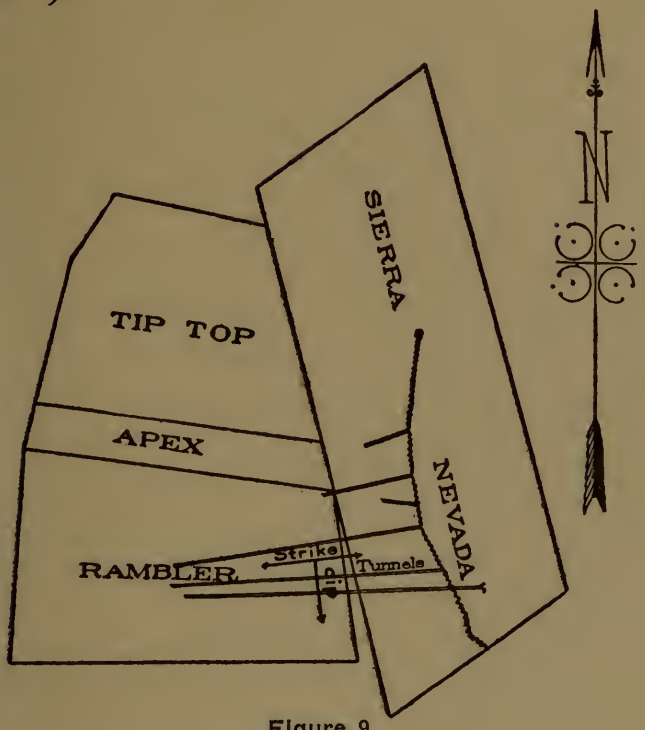

Figure 9.

The location of the defendant's claim, the Sierra Nevada, was upon the outcropping side edge of the vein following the dip, the line of exposure or outcrop being shown on Figure 9 by the zigzag line within the Sierra Nevada claim. The defendant's works, following the vein on the strike by tunnels driven at right angles to the outcrop, extended underneath the surface of plaintiff's claims, the Apex and the Rambler.

An injunction was sought and denied by the lower Court. The Supreme Court of Idaho reversed the order and directed an injunction principally on the ground that the location of the Sierra Nevada did not

cover the apex, and that the showing made did not justify or authorize its presence underneath the plaintiff's surface.

The facts in the case at bar are much less embarrassing than those which the courts were called upon to consider in the Duggan-Davey and Sierra Nevada cases, owing to the differences in the character of the vein. The principles, however, announced by the courts in these cases were applied by both the State and Federal Courts in determining the respective rights of the parties to the vein here in dispute. In the opinion of the Supreme Court of Idaho, 132 Pacific Reporter, at page 794, the Court reproduces a sketch showing the parallelism between the cases at bar, and the Duggan-Davey case.

Counsel for Appellant seems to contend that if you may lay the lines of a location across any given exposure and give to those lines a direction which would enable the locator to follow downward, that the exposure must necessarily be an apex. The fallacy of this suggestion is shown in all the definitions of what constitutes an apex, and what is meant by the term "course downward." This latter term means obviously the course downward from the apex, and not from a side edge.

This Court has distinctly held that

> "while the statute requires parallelism of the end lines and the courts have held that they may not be so divergent as to include more in length upon the dip of the vein than is allowed in length upon the surface, neither the statute nor any decision to

which our attention has been called defines any particular angle at which the end lines shall cross the general course of the vein in order that the extralateral right given by the statute may exist. . . . And that the extralateral right conferred by the statute may and does exist without regard to the angle at which end lines cross the general course of the vein has been held both by the Supreme Court and this Court." (Citing cases.)

Last Chance M. Co. vs. *Bunker Hill & Sullivan M. & C. Co.*, 131 Fed., 579, 590.

A retrospect of the numerous cases decided by this Court involving the properties of the Bunker Hill & Sullivan M. & C. Co., The Empire State Idaho and Last Chance Companies in the same district in which the cases at bar arose, exhibits the application of this rule, and the manner in which the vein was carved up and awarded to the respective companies, regardless of the angles made by the end lines with the apex. We reproduce as Figure 10 a stereogram, which exhibits the result of the application of the rule as announced by this Court.

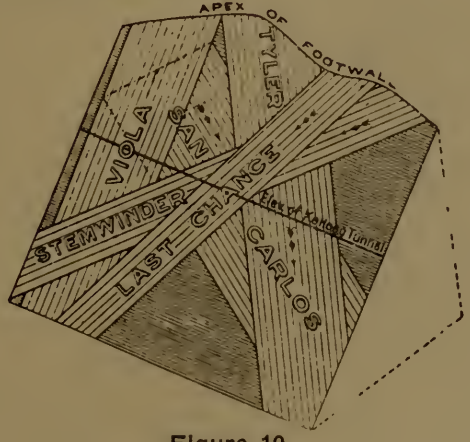

Figure 10.

It will of course be observed that all of the locations had lines which crossed the *apex* at some angle.

What counsel for Appellant in this case seems to contend for may be illustrated by reference to Figure 10. Assume that the Bunker Hill vein to have been terminated on its course by a fault plane represented by the right hand face of the figure. A location might be made along the fault line so as to give to the lines crossing the fault a direction so that in following along the plane of the crossing lines a course substantially downward would be followed. But it would not be downward from the apex. We can imagine what would happen to locators on the true apex of the vein if locations were permitted on the side edge and such locations should be awarded extralateral rights.

As was pointed out by Professor Lawson in his testimony (Transcript, No. 2390, p. 564), it is entirely possible to go downward from the *bottom* of the vein. The Judge of the trial court in the causes at bar also points this out (Transcript, No. 2390, page 45).

We quote from the Judge's opinion:

> "That a downward course may be pursued upon the vein from this edge to the disputed ore bodies is conceded; but we are not to conclude that an edge is the apex merely because the vein may be followed therefrom upon an inclination downward; clearly cases may very well arise where such a course can be followed from an undercut or bottom edge. Nor is it controlling that such downward course may be parallel with the end lines.

> The real relation of any given edge to the vein is in no wise affected by its relation to the boundary lines of the claim embracing it. These lines are wholly artificial and fortuitous, and if an edge is the top or apex of the vein it is such regardless of the question as to how the boundary lines of the claim are laid, or indeed whether any location at all has been made. If A-B and B-C were straight lines, thus forming a true angle at B, such angle would be less than ninety degrees, and under the definition relied upon by the defendant B-C would unquestionably be a bottom edge, and yet from such edge there would be a downward inclination from the vein in vertical planes parallel with the end lines of the claim."

The opinion of the trial Court in these cases found in Transcript, No. 2390, pp. 38-47, seems to us to be based on sound reasoning, and the result reached is in harmony with all the decisions of the courts which have come under our observation.

EXTRALATERAL RIGHTS ON SECONDARY VEINS.

If we assume for the moment that the patent to the Senator Stewart Fraction establishes without other proof that there is a discovery vein running from one end line to the other through the center of the claim and that the end lines as described in the patent are the end lines of all veins, and that a secondary vein on its course crosses the south side line of the Stewart Fraction claim, and runs substantially parallel with the end lines of the claim, which are assumed to cross an assumed discovery vein, to a point near the north

side line of the claim, still the law would not give the owners of the Stewart Fraction claim the right to pursue that vein on the strike beyond the south side line of the claim.

Let us suppose that a vein crosses the originally discovered vein and the claim at right angles, as illustrated on Figure 11.

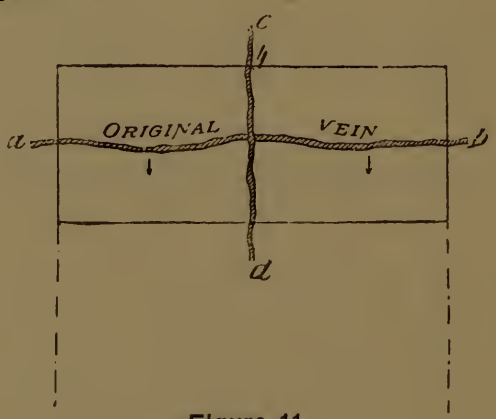

Figure 11.

A-B being the discovery vein and C-D the secondary vein. It is manifest that the end line plane on the original vein cannot be applied so as to cross the secondary vein at any angle. The plane so constructed would be parallel or coincident with the course of the secondary vein. Would the locator under such circumstances have any extralateral rights on the secondary vein?

The case of *Cosmopolitan Mining Company* vs. *Foote,* 101 Fed., 518, decided by Judge Hawley, presents a situation somewhat similar to the one presented on Figure 11, the facts of which are illustrated on Figure 12.

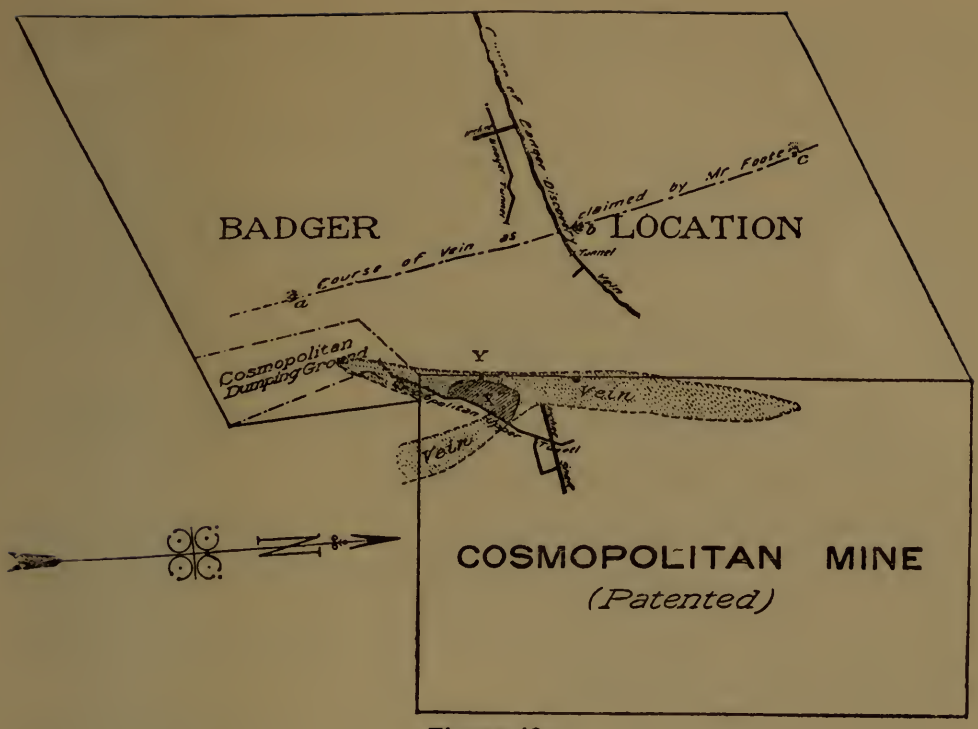

Figure 12.

While there was a sharp controversy over the facts, the Court found that the original discovery vein in the Badger was east and west. The apex of the secondary vein was north and south, close to the west boundary of the Cosmopolitan, but to some extent entirely within the Badger. The controversy was over the vein underneath the Cosmopolitan surface. The Badger location was originally located on the assumption that the discovery vein ran lengthwise of the location, but the Court found that its course was crosswise of the claim, making the located side-lines the end-lines, and as such determined the extralateral right planes on all lodes. As it was impossible to apply these side-end line planes to the apex of the secondary or Cosmopolitan vein, so as to grant the right

to the vein underneath the Cosmopolitan surface, judgment passed for the Cosmopolitan Company.

Under such state of facts it is impossible to conceive upon what principle any extralateral right could be granted on the cross or secondary vein without establishing two sets of end-line planes, which, as we have heretofore seen, is not permissible.

With this conclusion, Mr. Costingan, in his work on *Mining Law,* page 448, concurs.

In order to annex the ore bodies underneath the surface of the properties of the Appellees, it became necessary for Appellant to make an apex out of the side edge of the vein.

That this cannot be permitted is to our mind clearly pointed out in the opinion of the trial Court, and in the opinion of the Supreme Court of Idaho in the Stewart-Ontario case heretofore alluded to.

PRESUMPTIONS FLOWING FROM THE ISSUANCE OF A PATENT FOR A MINING CLAIM.

In the trial of Stewart-Ontario case, there was no attempt to establish the existence or position of any vein in the Senator Stewart Fraction claim, other than the one here involved. Unless this Court is required to presume in the absence of a negative showing that there was and is a discovery vein traversing the claim lengthwise, there is nothing before this Court which shows the existence of any vein except the one in controversy in the cases at bar. The inferences are con-

vincing that the vein here involved was and is the discovery vein.

Counsel for Appellant argues at great length in his brief filed in cause Number 2390 that the issuance of the patent to the Senator Stewart Fraction presumes the existence of a discovery vein running lengthwise of the claim, establishing the end lines on that vein as the end lines of all veins found within the claim.

He relies upon the decision of the Circuit Court of Appeals, Eighth Circuit, in the case of *Work Mining Company* vs. *Doctor Jack Pot M. Co.,* 194 Fed., 620, 114 C. C. A., 392.

As we have heretofore said in this brief, it does not appear to us to be necessary to discuss the question. The fact being that the asserted east end line plane as claimed by appellant does not cross the apex of any vein, but is laid upon a side edge, dispenses with the necessity of Appellee's combating the doctrine of the Work-Doctor Jack Pot case.

Our apology to this Court for entering upon a discussion of it is found in the length of Appellant's argument and his apparent conviction that the rule there laid down has some application to the facts at bar.

Furthermore, we are strongly of the opinion that the Court in the Work-Doctor Jack Pot case has fallen into an error which ought not to be perpetuated. We therefore take up this case for consideration.

The facts of the case may be illustrated by a diagram

prepared from the record in the case, which we herewith reproduce as Figure 13.

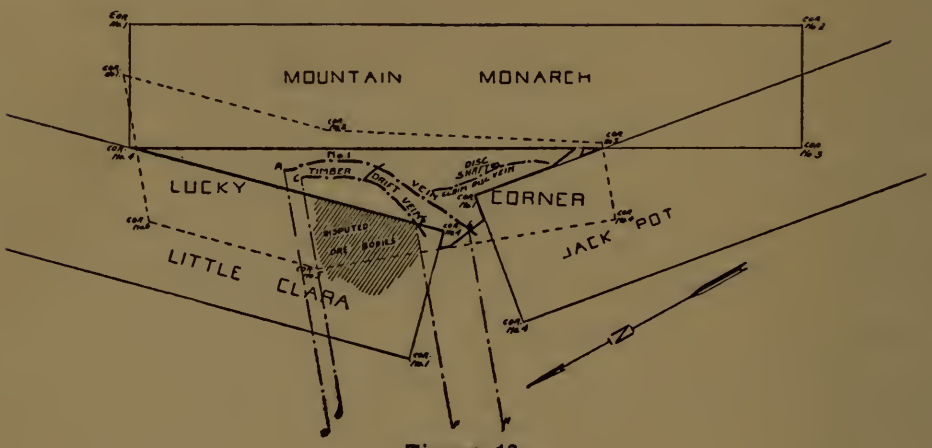

Figure 13.

The Little Clara owned by the Work Mining Company was a prior patented claim. The Lucky Corner owned by the Dr. Jack Pot Company was located in the form indicated by the dotted lines. Patent was issued describing the dotted area and excepting conflicts with prior claims—the net patented surface being indicated by the irregular shape marked with the heavy black line. The controversy arose over the ore bodies underneath the Little Clara surface, which pertained to two so-called secondary veins apexing in the Lucky Corner, known as Number One and Timber Drift veins. The action was ejectment by the Doctor Jack Pot Company to recover possession of the segments of the so-called secondary veins underneath the Little Clara.

With the discovery vein in position as indicated on figure 13 passing through the discovery shaft, the rule defining extralateral rights on secondary veins by

application of the planes of the discovery vein was invoked.

The answer of the Little Clara admitted the apex of each of these secondary veins to be within the surface lines of the Lucky Corner claim, but asserted that such apices on their course crossed two opposite nonparallel side lines, and also urged that as a matter of fact there was no discovery vein on the Lucky Corner claim.

In its rulings on demurrer, on motion to strike out parts of Defendant's defenses, on motion of Defendant for judgment at the close of plaintiff's case, and also upon instructions requested and denied, the trial Court held in effect that defendant could not show as a matter of defense that the Lucky Corner claim was located and patented without a discovery in fact, though the Court permitted the Defendant to present evidence on that point.

The plaintiff introduced its patent, showing parallel end-lines; proved the existence of the apices of the two secondary veins; located the points where such veins departed from the boundary lines of the Lucky Corner claim; established their continuity on the dip into the Little Clara claim, and located the ore bodies in question in Little Clara territory; proved that the subsidiary or secondary veins were not in the discovery shaft of the Lucky Corner, and rested its case without proving the apex or course of the discovery vein.

In its instructions, the Court practically took from

the jury the issue as to the nonexistence of the discovery vein, and charged the jury that the burden was on the defendant to prove that the discovery vein—which the Court held was conclusively presumed by the issuance of the patent to be in the discovery shaft—crossed the side-lines, instead of the lines claimed by the locator as end-lines, and that, failing in this, the end-lines as described in the patent must be taken as the true end-lines of the claim, and controlled the extra-lateral rights on the secondary veins. The jury found for the plaintiff.

The Circuit Court of Appeals sustained the action of the trial Court, holding that

> "the fact that a discovery vein existed in the discovery cut must, for the purposes of this case, be conclusively presumed, and that prima facie at least the end-lines of the claim as fixed in the patent are the true end-lines, and, in the absence of evidence showing that the discovery vein instead of running lengthwise of the claim in fact crosses opposite side-lines of the claim, the end-lines as fixed by the patent must prevail; and this for the reason that the claim being longer than it is wide, it is entirely fair to assume that the locator will take all of the length of the vein he can."

The Court lays some stress on the Colorado laws, which provide that the locator must, as an act of location, sink a discovery shaft showing a well-defined crevice, and that when patent issues, it must be conclusively presumed that such shaft was sunk and the necessary disclosure made. The only privilege allowed,

therefore, to a claim owner whose territory is invaded is to show that the vein in the discovery cut crosses the side-lines, instead of the lines located as end-lines. If there is in fact no discovery vein, defendant's hands are tied, for there is nothing to prove.

The Court of Appeals determined in effect that the patent when issued is not only presumptive evidence of the antecedent compliance with the requirements of the federal mining laws, but it is also presumptive evidence that all the location acts required by the state laws to have been performed had been performed. The state law of Colorado requires the sinking of a discovery shaft, which must disclose the crevice or vein. Therefore, patent having been issued, such vein must be conclusively presumed to exist in the shaft. If this be the correct rule, it follows that the force of a federal patent issued for a lode claim in a state having a discovery shaft law is much more potential than the same kind of a patent would be in a state having no such law, e. g., California and Utah. In other words, the California and Utah apex claimant must prove the situs and course of his apex when his rights are challenged by an outside proprietor whose territory is invaded, while in Colorado and other states similarly situated the burden shifts to the latter to show that the apex of the vein crosses the side lines, and this is the only defense available to him.

The fact that the force of a federal patent issued under the mining laws is to be determined to any

extent by the provisions of state laws, enacted subsequent to the federal statutes, seems to us an anomaly. These state laws are frequently changed, so that the patent may be presumptive evidence of a fact today, and to-morrow, by a repeal of the law, it may not carry any such presumption as to a patent subsequently issued.

It may be pertinent to remark that the laws of Colorado do not require that the apex of a vein should be exposed in the discovery shaft. A discovery on the dip of a vein suffices to support a location if within the limits of the claim as located. The state laws require that the notice of the location posted and recorded must contain the date of location. It might be said with propriety that if the patent is presumptive evidence of the existence of a vein in the discovery shaft, it is also evidence of the date of location, neither of these facts being recited in the patent. We know that the date of a location can be challenged after the issuance of a patent when a question of priority is involved.

State legislation supplementing the federal mining laws is undoubtedly permissive, but it must be remembered that the purpose of these laws to the extent that they exceed the requirements of the federal statutes deal exclusively with the subject of locations, and do not purport to in any way provide for conditions under which patents may issue.

Another suggestion which we think quite pertinent

finds expression in the decision of the Supreme Court of Utah, in the case of *Grand Central Mining Company* vs. *Mammoth Mining Company.*

> "What may constitute a sufficient discovery to warrant a location of a claim may be wholly inadequate to justify the locator in claiming or exercising any rights reserved by the statutes. What constitutes a discovery that will validate a location is a very different thing from what constitutes an apex to which attaches a statutory right to invade the possession of and appropriate the property which is presumed to belong to an adjoining owner."

29 Utah, 490, 83 Pac. 648, 677. Appeal dismissed, 213 U. S. 72, 29 Sup. Ct. Rep. 413, 53 L. ed. 702.

Id., 194 Fed., 620, 626; 114 C. C. A., 392.

Where there is no opportunity or necessity for adversing, an application for patent proceeds ex parte, and the declarations of the applicant are essentially self-serving.

The Court of Appeals, in the Work-Doctor Jack Pot case, quotes in support of its ruling an excerpt from the opinion of the Supreme Court of the United States in *Enterprise Mining Company* vs. *Rico-Aspen Mining Company,* 167 U. S., 108, 115; 17 Sup. Ct. Rep., 762; 42 L. ed., 96:

> "The presumption, of course, would be that the vein ran lengthwise and not crosswise of the claim as located."

In this case a patent had been granted for a mining claim lying parallel with the line of a discovery tunnel. It was contended that the tunnel locator should have adversed the patent application, in order to have secured the right to veins discovered in the tunnel which crossed the patented claim, the inception of the tunnel right being prior in time. In using the above quoted language the Court undoubtedly referred to a natural rather than a legal presumption. In any event, the case is not authority for the rule that such a presumption, if a legal one, is conclusive.

In the Work-Doctor Jack Pot case, the Little Clara having gone to patent was not called upon to adverse the junior application, and this for three reasons: First, where a patent has once been issued, purporting to convey a given tract of land in its entirety, the patentee has a right to rest upon its sufficiency and validity; second, the subsequent application for patent of the Lucky Corner in terms excluded all conflict with the Little Clara; and, third, underground rights are never the subject of adverse claims.

> *United States Mining Company* vs. *Lawson,* 134 Fed., 769, 772. Affirmed 207 U. S., 1.

The Circuit Court of Appeals recognized this, but suggested that the owners of the Little Clara might have protested against the issuance of the patent. Upon what knowledge or information could this protest be based? The owners of the Little Clara are not

presumed to have had access to the territory applied for by the Lucky Corner, nor to have known whether or not a discovery had been made therein. An attempt to investigate conditions shown in the workings of the Lucky Corner without consent would be clearly a trespass.

Again, to place the duty of making a protest upon every claim owner whose premises may be invaded at some subsequent time—perhaps many years later, when extensive development work has disclosed unthought-of geological conditions—is not only impracticable but unconscionable. For instance, in the vicinity of the Bunker-Hill mines at Wardner, Idaho, the underground rights of mining claims have been affected by the extralateral sweep of a vein apexing more than a mile distant.

The decision of the Circuit Court of Appeals in the case under discussion appears to us to be out of harmony with the reasoning of the same court in the case of *Uinta Tunnel Mining and Transportation Company* vs. *Creede and Cripple Creek Mining and Milling Company,* 119 Fed., 164, with reference to adjudications of the land department which are *res inter alios acta.*

For administrative purposes the land department necessarily assumes that the course of the vein is lengthwise of the claim, but this does not signify that when the patent once issues there is a presumption that such is the fact. If the doctrine of the Circuit

Court of Appeals in the case under consideration should be applied to the flat deposits found in Leadville, or in the Black Hills of South Dakota, or to the copper sulphide zones of Nevada and Arizona, or in the phosphate regions of Idaho and Wyoming, all of which must be patented under the lode laws, as the deposits are essentially in place, the production of a patent presuming an apex extending lengthwise of the claim would take the entire sweep of the deposit, since it would be impossible for the defendant to prove that the vein crossed the side-lines of plaintiff's claim.

If the rule established by the Circuit Court of Appeals had been applied in the epoch-making litigation which arose over the blanket deposits at Leadville, the mining map of that region as well as a judicial mining history would have been very different.

All of the states above named have discovery shaft laws.

It seems to us that the rational solution of the difficulty is not to consider the rule, which requires an apex claimant to justify his presence in foreign territory by showing the position and course of his apex, as an attack on the patent, but rather an inquiry as to what was granted by the patent outside of its vertical boundaries.

In support of the validity of the patent as it affects and conveys intralimital rights, such patent may be given conclusive effect. But when attempts are made to assert rights which are extralateral, the exercise of

which must be predicated on the existence of physical facts, rather than presumption, it would seem the party asserting the extralateral rights should be compelled to prove the facts.

In the Doctor Jack Pot case, the placing of the burden of proof as to the course and direction of the apex of the Lucky Corner discovery vein upon the owner of the Little Clara, the invaded territory, would appear in disregard of the presumptions flowing from the issuance of a patent for the latter claim.

With the highest respect for the opinion of the Eighth Circuit Court of Appeals, we feel that its opinion in the Work-Doctor Jack Pot case asserts a doctrine that will not receive the sanction of the Supreme Court of the United States.

We understand the unvarying rule to be that where an outside apex proprietor seeks to justify his presence underneath the surface of another's property, the burden is upon him to establish the facts by a preponderance of evidence. In other words, he is called upon to prove that within the boundaries of his claim there is an apex of a vein traversing the claim in such a direction as to permit the exercise of an extralateral right. In other words, to quote from an opinion by Judge Hawley:

> "Hands off of any and everything within my surface lines, extending downward vertically until you

prove you are working upon and following a vein which has its apex within your surface claims."

Cons. Wyoming vs. *Champion,* 63 Fed., 540, 550.

We have always been of the opinion, and we think it supported by the weight of authority, that in justifying his presence underneath foreign territory the apex claimant is not aided by any presumptions of fact flowing from the patent with regard to the position of the apex and its course through the claim; that the conclusive presumption as to the validity of the patent is confined to the surface area and its vertical bounding planes, that is, to its intralimital rights, which are subject to a right of invasion only by an outside apex proprietor—a right reserved by law and expressed in the patent. In other words, a lode patent does not raise any presumption in justification of the invasion of another's territory, as to the position of the apex or the course of the vein, but these facts, when challenged by the proprietor of the invaded claim, should be proved by the apex claimant, regardless of presumptions flowing from the patent.

In the causes at bar we are not seeking to attack Appellant's patent for the Senator Stewart Fraction Claim. It stands unassailable by collateral attack as to the fact that it was supported by a discovery within its limits. We are simply insisting that as we were not a party to the patent proceeding, we are in no

sense concluded by any presumptions flowing from it, when such presumptions are invoked to justify an invasion of our property. We have never had our "day in Court" as to the position of the vein, and are only insisting that Appellant assumes the burden laid upon everyone where it seeks to invade outside property.

We respectfully submit that the decrees in all the cases at bar should be affirmed.

CURTIS H. LINDLEY,
MYRON A. FOLSOM,
Attorneys for Appellees.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH DISTRICT.

STEWART MINING COMPANY (a corporation), *Appellant,* vs. BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY (a corporation), *Appellee.*	No. 2389.
STEWART MINING COMPANY (a corporation), *Appellant,* vs. SIERRA NEVADA MINING COMPANY (a corporation), *Appellee.*	No. 2391.

APPELLEE'S REPLY TO APPELLANT'S SUPPLEMENTAL BRIEF.

Appellant has filed a Supplemental Brief herein and has introduced certain new elements into its argument and has also cited additional authorities. While counsel for the above named appellees is willing to rest their case on the brief already filed on behalf of appellees, yet, in order to avoid any possible claim that he has been derelict in his duty to his clients, this Reply Brief is respectfully submitted.

Appellant has cited the *Providence-Champion case,*

63 Fed., 522; 72 Fed., 978; 171 U. S., 293, in support of its contention that an extralateral right on a secondary vein is awarded to the full extent of the extralateral right on the primary or discovery vein. It should be borne in mind that in that case the discovery vein apex was established to extend from end line to end line of the Providence claim and that the course of the apex of the secondary vein within the Providence claim boundaries was found to be substantially parallel to the course of the discovery vein apex. Neither of these features exist in the case at bar. The course of the apex of the claimed discovery vein in the Senator Stewart Fraction claim is not shown to extend through this claim and the physical conditions negative the possibility of such being the fact, the appellant relying merely upon a presumption claimed to flow from its patent (the unreasonableness of such a contention is illustrated most strongly by the case at bar where physical facts would be distorted to create an impossible condition if such a presumption should prevail); and finally the course of the apex of the secondary vein is practically at right angles to the course which the apex of the discovery vein must be presumed to take if appellant's contention be accepted. The Providence-Champion case has no application here for the facts are not at all similar.

However, even if we assume for the sake of argument, that the facts of the Providence-Champion case and the case at bar were similar enough so that appellant could invoke the rule he contends was laid

down in the former case, the very greatest doubt has been cast upon the intention of the Court in that case to decide that the extralateral right on a secondary vein shall be measured by the identical planes which measure the extralateral rights on the discovery vein.

The writer of this brief happened to be counsel for the Champion Company throughout that litigation. No cross-appeal was taken by the Champion Company to either of the Appellate Courts for economic reasons. For convenient reference the following diagram illustrating the facts of the Providence case is here inserted.

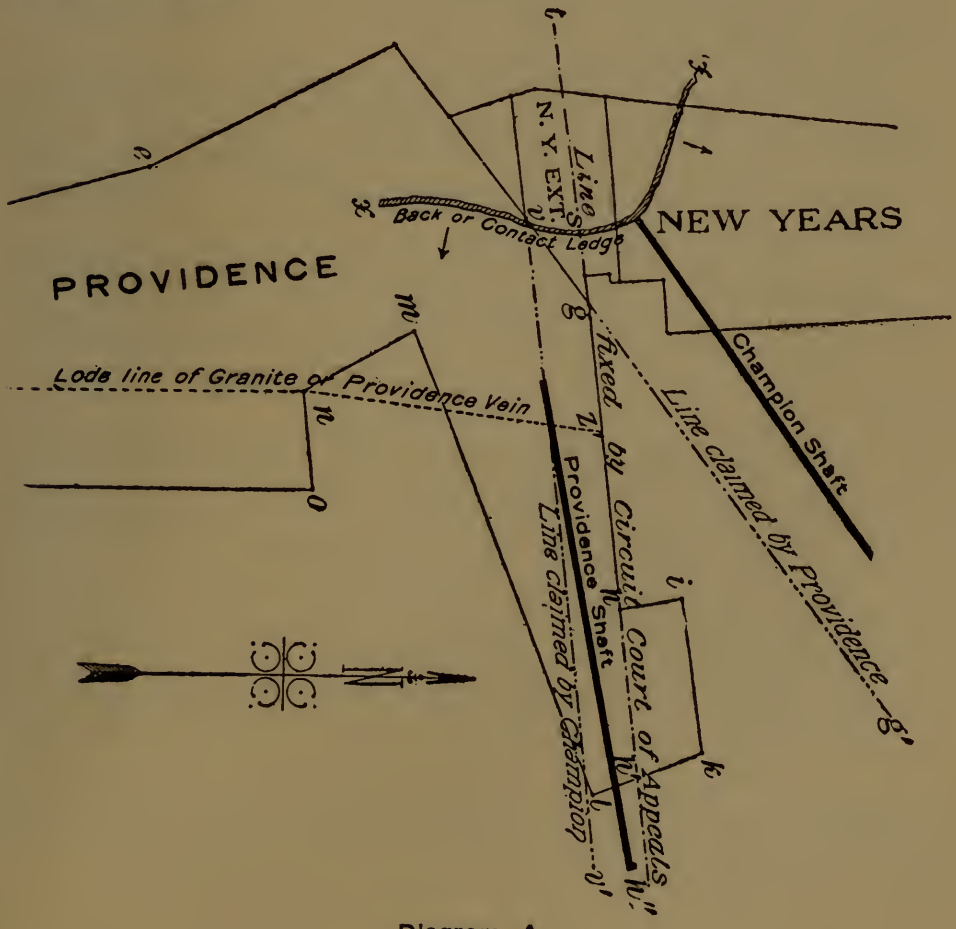

Diagram A.

All of the vein lying north of the plane v-v′ parallel to the northerly Providence end line gh and passed through the point v where the apex of the secondary vein departed from the Providence claim in a northerly direction had been worked out years before the litigation arose. This strip of ground between this plane v-v′ and the northerly end line plane gh″ was practically valueless, and for that reason no attempt was made by the Champion Company on either of the appeals to confine the Providence Company in the exercise of an extralateral right on the secondary vein to the length of the apex of the secondary vein found within the claim.

That this case should not be considered as an authority in support of appellant's contention is very evident from the following expressions of opinion:

Mr. Henry Arnold in a very able and analytical review of the effect of this decision, found in *Harvard Law Review,* Volume 22, page 284, says:

> "But if that be indeed the holding of the court in *Walrath* vs. *Champion* . . . it has at least been shaken by the almost universal adverse criticisms of jurists and by the fact that it was not followed in a later decision by the Circuit Court of Appeals in *Montana M. Co. Ltd.* vs. *St. Louis M. & M. Co.* (102 Fed., 432, and 104 Fed., 664).

See also *Costigan on Mining Law,* page 448, where that author says:

". . . because it was a dictum which affected no substantial right of the Champion Company, that company took no cross-appeal. It will take another decision by the United States Supreme Court to define the effect of *Walrath* vs. *Champion Min. Co.* and to determine whether that dictum is to become settled law. Meanwhile it is possible to say that in any event the case announces a rule applicable only to claims located and patented under the act of 1866."

It is interesting to note that Costigan goes on to say:

"Where the incidental vein cuts across the discovery vein at right angles, or otherwise lies at right angles to the discovery vein, the doctrines that there can be but one set of end lines for extralateral right purposes for the claim, that those must be fixed with reference to the discovery vein, and that there can be no extralateral right of pursuit on the strike of a vein, necessarily compel a denial of any extralateral right to the secondary vein."

(See figure No. 47, page 449, of Costigan, illustrating this statement and which is a very close approximation to the situation presented by the case at bar.)

Judge John B. Clayberg has the following to say of this case in the *California Law Review,* Vol. 1, page 352:

"If we apply the rule strictly as therein announced, i. e., that the end line planes of a loca-

tion, as fixed by the original vein, for determining extralateral rights thereon, bound the extralateral rights to all incidental or secondary veins, the absurd result would follow, that if the original vein on its course ran through two parallel end lines of an ideal location, such location would have extralateral rights on all secondary or incidental veins apexing therein, for the full length of the claim, while the length of the apex of such secondary vein, within the claim, might be only a few feet. We cannot impugn such an absurd conclusion to the greatest court in the world. It is very apparent from the opinion, that such conclusion never entered the minds of the judges of that court. The Del Monte case (171 U. S., 55) was decided on the same day, and in that case, the Court announced the rule that a greater length along the strike of a vein extralaterally, than the length of the apex within the location, should not be given. The Court, in the Walrath case, cites and quotes from the Del Monte case, and relies upon it as an authority."

The case of *Davis* vs. *Shepherd,* 31 Colo., 150, is cited by appellant's counsel in support of the same contention. The following diagram will illustrate the facts there presented.

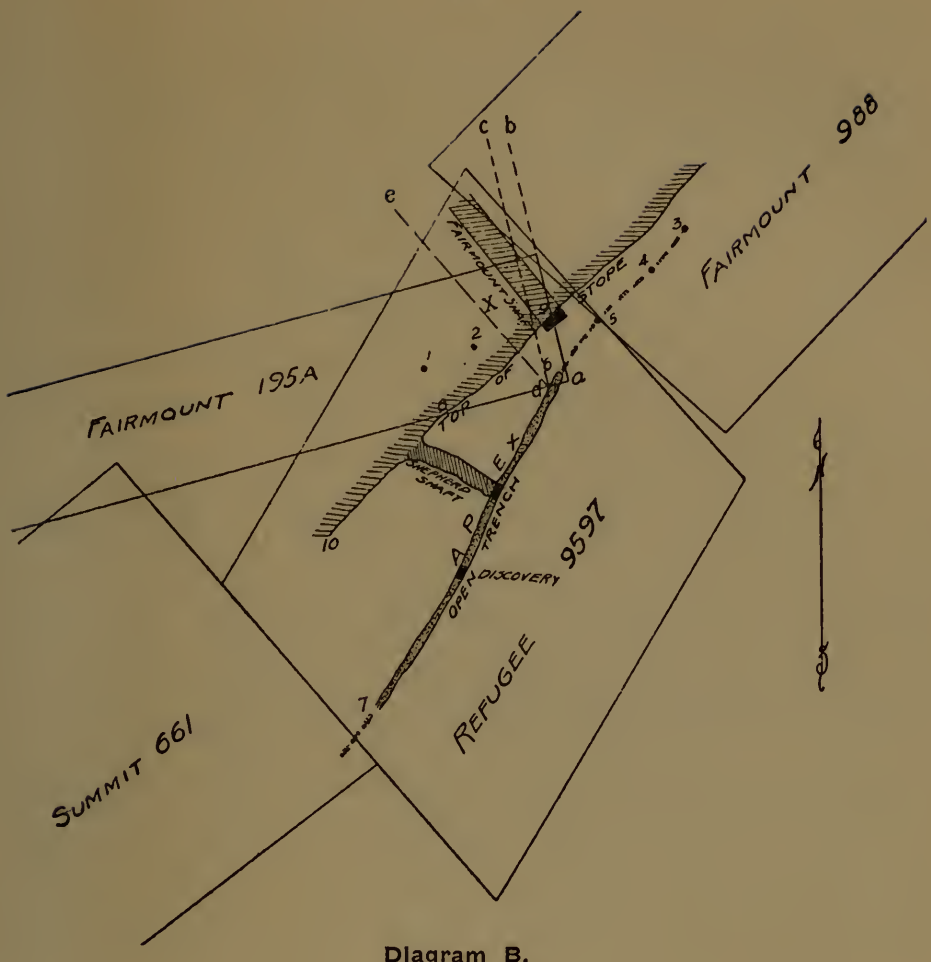

Diagram B.

In that case the apex of the vein in question crossed the southerly side line of the Fairmount 195A claim and within a few feet this apex passed out through the easterly end line of the same claim. The case has no application to the case at bar since the apex of the vein here in controversy does not pass out through the Senator Stewart Fraction end line.

Counsel for appellant also cite the case of *Jefferson Co.* vs. *Anchoria-Leland Co.,* 32 Colo., 176, which it also contends is authority in support of the same proposition.

The following diagram, based upon the one accompanying the opinion of the Court, but slightly elaborated, will illustrate the facts involved.

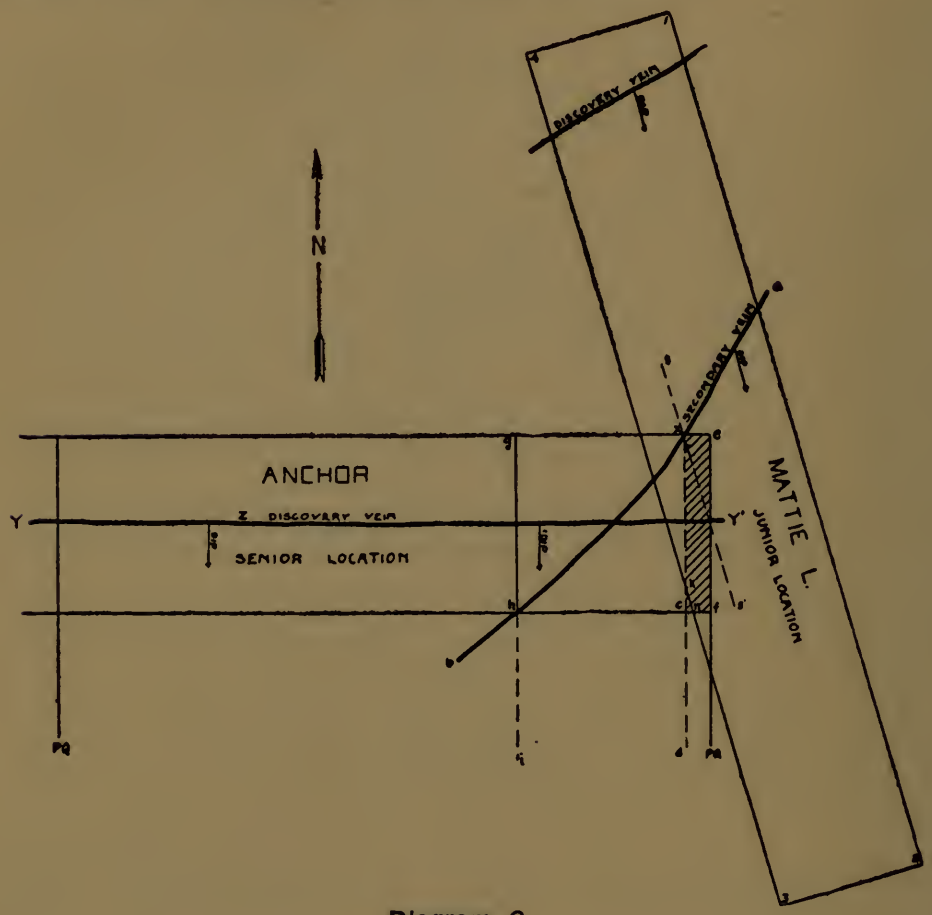

Diagram C.

The Anchoria-Leland company owned the Anchor, and the Jefferson company the Mattie L. The Anchor was the senior of the claims both as to location and patent. The discovery vein Y-Z-Y′ in the Anchor crossed both end-lines, although the fact does not appear on the diagram in the opinion. The secondary vein in the Anchor a-b crossed two side-lines. Both the discovery and secondary veins in the Mattie L. crossed the lines located as side-lines. The vein a-b

was secondary in both locations. The controversy arose over the underground parts of the secondary vein lying underneath and within the conflicting surface area of both claims—i. e., within the parallelogram c-x-e-f. The contention of the Jefferson company was that the Anchoria-Leland rights in the secondary vein a-b should be defined by constructing a plane parallel to the end-line (e-f), at the point X, where the secondary vein passed out of the north side-line of the Anchor. The Anchoria-Leland Co. claimed a right to all the ore in the secondary vein underneath the Anchoria surface. The Court upheld the claim of the Anchoria-Leland on the theory that the question involved the intralimital rather than the extralateral rights of the Anchor claim, and that claim, being senior in point of time, secured all underground parts of the secondary vein underneath the surface, though such parts extended beyond a plane parallel to its end-lines drawn at the point on the side boundary where the apex of the secondary vein crossed such boundary at the point x and entered the territory of the junior claim.

This case has been carefully analyzed by Arnold in the *Harvard Law Review,* Vol. 22, pp. 276-283, 343-349. As Arnold points out very clearly, if the case had been decided as it should have been upon the basis of extralateral rights the Court's holding must have been quite different.

Also see Costigan, page 441, note 112, where the author in discussing this case points out the error of

the Court in failing to determine the case upon the basis of extralateral rights and states that

> "to the extent of such failure the decision must be wrong. While the case has the support seemingly of *Walrath* vs. *Champion Min. Co.*, 171 U. S., 293, that case is discredited as the discussion in this section (infra p. 447) shows, and any way should be confined to locations under the Act of 1866."

And the author then points out further inconsistencies in the decision.

In the "Niagara-Black Rock" case (*Fitzgerald* vs. *Clark,* 171 U. S., 92) the Supreme Court of the United States has held that a junior claimant is entitled to exercise an extralateral right, even underneath the surface of a senior claim containing a portion of the apex of the vein in question and is diametrically opposed to the *Jefferson* vs. *Anchoria Leland* case.

The Fitzgerald-Clark case is illustrated by Diagram D.

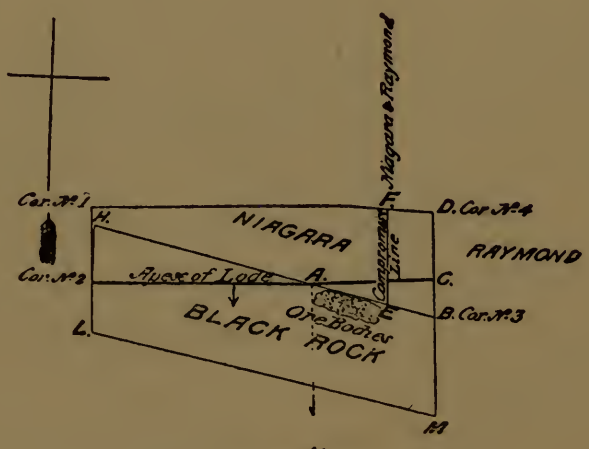

Diagram D.

The Black Rock was the older claim with part of the apex. The ore bodies in dispute were underneath the Black Rock surface beyond the point where the vein passed out of the side-line common to the two claims. Such ore bodies were in a sense intralimital to the Black Rock, but extralateral to the Niagara. The State Court and the Supreme Court of the United States in effect denied to the Black Rock any intralimital rights on that portion of the vein underneath its surface extending beyond the point where the apex crossed the side-line, awarding such underground parts to the Niagara—the junior claim—under its extralateral right.

The case of *Ajax Gold M. Co.* vs. *Hilkey,* 31 Colo., 131, decided by the same Court that decided the Jefferson-Anchoria case, but at an earlier date, in our opinion, expresses the correct rule to the effect that the extralateral right on a secondary vein is determined by the length of apex of the secondary vein found in the claim. This case is illustrated by Diagram E.

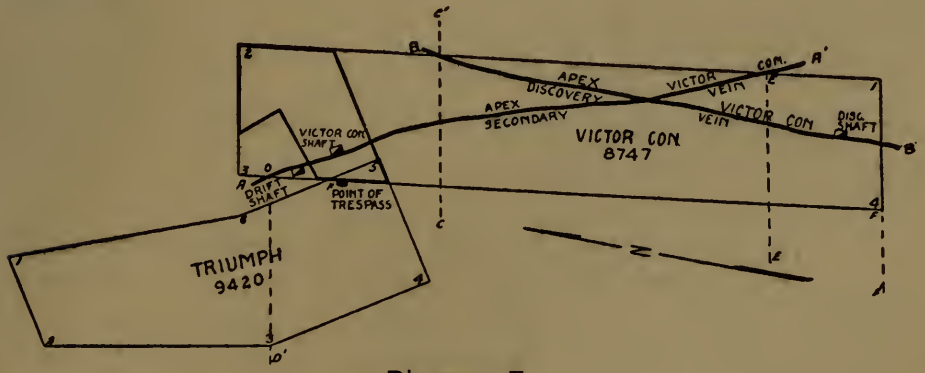

Diagram E.

The Ajax Company owned the Victor Consolidated claim. The discovery vein B-B′ crossed the southerly end line and proceeding in a northerly direction passed out of the east side-line. The secondary vein A-A′ passed diagonally through the claim crossing both side lines. The defendant Hilkey owned the Triumph adjoining the Victor on the west. The secondary vein in the Victor on its downward course entered underneath the surface of the Triumph, and the controversy was over the ore bodies underneath the surface of this claim. The Ajax company claimed that its extralateral right in the secondary vein was to be defined by the application of the plane D-D′ parallel to the end-line on the original 1-4 at the point where the vein crossed the west side-line of the Victor. The Triumph owner contended that as the extralateral right on the original lode was to be defined and limited by the plane C-C′ drawn through the point where the discovery vein passed out of the east side-line—the plane being parallel to the south end-line—that no extralateral right in the secondary vein could extend northerly beyond the plane C-C′.

The Court upheld the contention of the Ajax company applying the plane D-D′. In rendering its decision it said in part:

> "In the Walrath case, which was twice before the Circuit Court of Appeals (63 Fed., 552, 19 C. C. A., 323, 72 Fed., 978) and once before the Supreme Court of the United States, there are some expressions in the opinions of the Circuit Court of Appeals from which, taken alone, it might be inferred that under facts like those here

present the owner of a claim would have extralateral rights in the discovery vein even beyond where on its strike, it leaves the side-line; and that the bounding planes, within which such rights are to be exercised, must be drawn through the two end-lines. But appellant makes no such contention here, and is content with extralateral rights in the discovery vein only up to the point of its departure from the east side-line, so that for our present argument we assume that to be the true doctrine."

After placing the responsibility for the rule applied by it upon the concession of counsel, who declined to claim more of the vein than the application of this rule would award to his clients, the Court proceeds to enunciate principles which clearly demonstrate that it was the only rule which could possibly be applied without violating some of the cardinal principles established by the courts of last resort. We quote further from the opinion of the Court:

"The end-lines constitute a barrier, beyond which a locator cannot follow a vein on its strike, whether it be a discovery or secondary vein; and they also limit the bounding planes within which his extralateral rights are to be exercised in following such vein on its dip. In exercising such extralateral rights the locator cannot in any case pursue the vein on its dip beyond the bounding planes drawn through the end lines. . . . The extent of the right depends upon the length of the apex, and the extralateral rights are measured not necessarily by the end-lines, and only so when the vein passes across both end-lines, but by bounding planes drawn parallel to the end-lines passing through the claim at the points where it enters into and departs from the same. It would seem, therefore, necessarily to follow that the extralateral right de-

> pends *inter alia* upon the extent of the apex within the surface lines, and, while the end-lines of the claim as fixed by the location are the end-lines of all veins apexing within its exterior boundaries, the planes which bound such rights of different veins may be as different as the extent of their respective apices, though all such planes must be drawn vertically downward parallel with the end-lines. It makes no difference in what portion of the patented claim the apex is. Its extralateral rights under this rule can easily be ascertained."

The Court was of the opinion that the rule thus enunciated was deducible from the Niagara-Black Rock case (42 Pac., 273, affirmed in 171 U. S., 92), the decision in *Tyler* vs. *Last Chance M. Co.* (71 Fed., 848), and from the language of Judge Hallett in the Del Monte case (66 Fed., 212).

This brings us back to the fundamental question involved and which we have fully discussed in our former brief, that the side edge of the Senator Stewart Fraction vein found abutting against the Osborne fault cannot, under any circumstances, be considered an apex. All the cases cited by appellant in its supplemental brief are to this extent inapplicable, no matter what interpretation is placed on the holding of those cases.

All question, however, as to the correct measure of extralateral rights on secondary veins is set at rest by the decisions of this Circuit Court of Appeals in the cases of *Montana M. Co. Ltd.* vs. *St. Louis M. & M. Co.,* 102 Fed., 430, and *St. Louis M. & M. Co.* vs. *Montana M. Co.,* 104 Fed., 664. The facts are illustrated by the following Diagram F.

Diagram F.

In those cases, though the original or discovery vein of the St. Louis extended from end line to end line, the Court limited the extralateral right on the secondary vein to the length of apex of the secondary vein a-c found within the boundaries of the claim, and cited as authority for such determination the cases of *Iron Silver Min. Co.* vs. *Elgin M. & S. Co.,* 118 U. S., 196, and *Walrath* vs. *Champion M. Co.,* 117 U. S., 293. The fact that this Court which decided the Walrath-Champion case did not in deciding the St. Louis case apply any such doctrine as that contended for by appellant is a circumstance of the highest corroborative value, supporting our view that the decision in the Walrath case was never intended to sanction any such doctrine.

In the final decision rendered by this Circuit Court

of Appeals in the St. Louis litigation it is stated that the extralateral right on this secondary vein as there defined has been approved by the Supreme Court of the United States. *Montana M. Co.* vs. *St. Louis M. & M. Co.,* 183 Fed., 51, 61.

Appellant has quoted from a number of authorities defining the terms "top or apex." These definitions are in the main accurate, but they do not in any measure support appellant's contentions. They refer invariably to the top edge or upper terminal edge of the veins there under consideration and there is nothing contained either in the definitions themselves or in the cases with reference to which they were formulated that would tend in the slightest degree to indicate that they had any reference or application to the side-edge of veins any more than they would have to the bottom edge of veins. Appellant in citing these definitions fails to appreciate the vital distinction which exists between the top or upper edge of a vein which is its true apex and the side edge or longitudinal termination of a vein which is no more an apex than is the bottom edge or downward termination of a vein.

Every vein has a terminal edge in both directions as we follow the vein along longitudinally or on its strike for all veins are limited in their extent, being usually tabular masses terminating in length as well as in an upward direction. The Osborne fault merely operated to make a more decided or clean cut side edge and termination of the vein on its strike than

occurs ordinarily with all veins which have reached their longitudinal limits. It was never intended that an extralateral right would be conferred on the locator who by chance or with premeditation included such a side-edge of a vein within his location boundaries any more than the statute was intended to confer an extralateral right on the locator who includes the bottom edge or downward termination of a vein within his boundaries.

Let us assume a condition which is practically the situation presented here but slightly idealized to illustrate more forcibly the effect of the contention made by appellant. Assume that a presumption exists that the discovery vein extends throughout a claim from end line to end line and also assume that the end lines are laid out at right angles to the lode line, and assume further that the apex of a secondary vein crosses a side line at right angles to the side line and extends into the claim some distance but does not reach the other side line and terminates within the claim against a vertical fault or dyke beyond which no vein is found. We will also assume that the dip of this secondary vein is at right angles to the strike, that is it is parallel to the side lines. Will it be contended that under such circumstances an extralateral right shall be awarded on the secondary vein? Shall the fortuitous circumstance that the secondary vein is terminated on its strike within the claim, alter the situation and make an apex out of the side edge abutting against the ver-

tical fault or dyke, when it would be clear that if the secondary vein continued on through the claim and crossed the further side line no extralateral right could be awarded? To award an extralateral right under such circumstances between end-line planes is to permit of the exercise of an extralateral right parallel with the strike of the vein and carving out from underneath the apex of the secondary vein found in adjoining claims a width of vein in depth limited only by the end-line plane of the first claim. And how many miles shall such an extralateral sweep following along parallel to the strike of the vein be deemed to extend? We can conceive of circumstances where the one locator would take the entire vein indefinitely on the strike undercutting all adjoining apex proprietors, as far as the vein might be found to extend longitudinally if this contention be correct.

Appellant at the top of page 13 of its Supplemental Brief advances the argument that if a senior locator covered the side edge of the vein here in dispute (which would be that portion abutting against the Osborne fault), and later a junior locator covered what we have for the purposes of this case conceded to be the apex of the vein in question, or that portion of the top or terminal edge having a northerly and southerly course within the Stewart Fraction claim, that under appellee's theory of the case the senior locator would be deprived of any extralateral right by reason of the superior right of the junior location.

We cheerfully accede to this statement of the result which would follow from such an hypothetical situation. The senior locator had nothing which he could lawfully locate, provided, as we have assumed, that his location includes only the side edge of the vein along the Osborne fault. He has, in other words, made a location which embraces only the dip segment of a vein and his common law rights must always yield to the extralateral right of a junior locator who includes the actual top edge or true apex of the vein within his claim.

Fitzgerald vs. *Clark,* 171 U. S., 92.

The situation is no more inequitable in the Stewart case than it was in the Fitzgerald-Clark case. The senior location overlying the vein on its dip gains no right by virtue of mere priority as against a junior location properly including the apex of the vein within its boundaries.

Another point which appellant overlooks is that the existence and extent of an extralateral right depends not only on including the apex of a vein within the boundaries of a location, but that the apex must bear such a relation to these boundaries as to permit of the exercise of such a right. "That many cases may arise " in which statutory provisions will fail to secure to " a discoverer of a vein such an amount thereof as " equitably it would seem he ought to receive" is very clearly stated in the case of *Del Monte M. Co.* vs. *Last Chance M. Co.,* 171 U. S., 55, 67. In other

words, merely because a locator includes a segment of apex of a vein within his boundaries gives him no inherent right to exercise an extralateral right based thereon. For this reason appellants' argument on p. 13 of its Supplemental Brief that merely because the end lines of the Stewart Fraction might have been so placed as to result in the exercise of an extralateral right and therefore it should not forfeit that right because its boundary lines were erroneously placed is not apt.

Respectfully submitted.

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